FEDERAL COURTS

Barikyan v Barr, 3/4/19 – **2nd CIRCUIT / CONSPIRACY / AGGRAVATED FELONY**
The petitioner, a native and citizen of Russia, petitioned for review of a 2017 BIA order which affirmed an IJ decision ordering his removal. He entered the U.S. on a temporary visa in 1996 and became a LPR in 2008. After a 2016 conviction, rendered upon a guilty plea of conspiracy to commit money laundering, DHS charged the petitioner with an aggravated felony. On appeal, the petitioner argued that his conviction was not an aggravated felony and that the Government did not demonstrate that he laundered more than $10,000. The **Second Circuit** denied the petition. The plain statutory language rendered the conviction an aggravated felony; it was an offense described in § 1956 of Title 18. Conspiracy to commit money laundering is an aggravated felony only if the amount of the funds exceeded $10,000. The petitioner did not challenge the reliability of the $120,000 forfeiture order, but argued that the criminal forfeiture statute sometimes required forfeiture of legitimate funds. However, he offered no proof to support his theory that some of the forfeited funds could have been proceeds of an investment made with laundered funds, or legitimate funds commingled with tainted cash. Thus, the agency properly found find that $10,000 of the forfeiture amount reflected laundered funds.
http://www.ca2.uscourts.gov/decisions/isysquery/28440d7d-285e-419b-95e6-91fdd31705cf/8/doc/18-14_op.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/28440d7d-285e-419b-95e6-91fdd31705cf/8/hilite/

Lukaj v US AG, 2/26/19 – **11TH CIRCUIT / *DIMAYA* / REMAND**
The petitioner was a LPR of the U.S., but was removable if a prior conviction for aggravated battery constituted an aggravated felony. To be considered a crime of violence, a conviction can involve either "an offense that has as an element the use, attempted use, or threatened use of physical force against the person" (18 USC § 16 [a]); or an "offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person may be used in the course of committing the offense" (18 USC § 16 [b]) ("residual clause"). Citing *Sessions v Dimaya*, 138 S Ct 1204 (2018) (residual clause void for vagueness), the **Eleventh Circuit** held that the residual provision could not serve as the basis for classifying the instant petitioner's conviction as a crime of violence and an aggravated felony that made him ineligible for relief from removal. The matter was remanded to the BIA for a determination as to how to classify the aggravated battery conviction and to determine eligibility for cancellation of removal.

Hemans v Searls, 2/27/19 – **PRO SE HABEAS / DETENTION TOO LONG**
The petitioner, a citizen of Jamaica, was detained for more than two years, three months, awaiting judicial review of a final order of removal. He filed a *pro se* petition for a writ of habeas corpus challenging the validity of his detention in Batavia. **District Court – WDNY** conditionally granted the petition. The petitioner had been in DHS custody since his release from the Ulster Correctional Facility in November 2017. The detention period was far longer than the four-month average period contemplated by the U.S. Supreme Court. *See Demore v Kim*, 538 US 510, 529 (2003). The petitioner was not responsible for the delay. He spent all but one month in detention because he was awaiting decisions from

the IJ, the BIA, and the Second Circuit. His interest in freedom pending removal deserved great weight. The petitioner was married to a U.S. citizen and had four children, three of whom were U.S. citizens. While he received an individualized hearing in February 2017, he was now entitled to reconsideration. His continued detention violated due process. The petitioner was ordered released in 14 days, unless the Government demonstrated, by clear and convincing evidence before a neutral decision-maker, that continued detention was necessary to serve a compelling interest.

APPELLATE DIVISION / APPELLATE TERM

Immigration Issues

People v Kilkenny, 3/5/19 – ***SUAZO* / JURY TRIAL / INVENTORY SEARCH**
The defendant appealed from a judgment of NYC Criminal Court, rendered after a nonjury trial, convicting him of attempted forcible touching, 3rd degree sexual abuse, and attempted 3rd degree criminal possession of a forged instrument. As the People conceded, the noncitizen defendant was entitled to a jury trial because the charged crimes carried a potential penalty of deportation. *See People v Suazo*, 32 NY3d 491. Thus, the judgment was reversed, and a new trial was ordered. **Appellate Term – First Department** also held that Criminal Court erred in denying suppression of a forged MetroCard recovered from inside the defendant's wallet. The hearing proof was insufficient to establish that police did a legitimate inventory search; and the hearing evidence did not establish exigent circumstances justifying the warrantless search. Since the forged instrument charge was based upon evidence obtained by means of the unlawful search of the defendant's wallet, that count was dismissed.
http://nycourts.gov/reporter/3dseries/2019/2019_50245.htm

People v Manzanales, 3/6/19 – ***PEQUE* DUTY / COURT COMPLIANCE**
The defendant appealed from a judgment of Nassau County Supreme Court, convicting him of 2nd degree assault upon his plea of guilty. The **Second Department** affirmed. The defendant contended that his plea was not knowing, voluntary, and intelligent. Since the issue would survive a valid waiver of the right to appeal, the appellate court did not consider the validity of the defendant's purported waiver. His contention concerning the guilty plea lacked merit. The Supreme Court expressly advised the defendant of the rights waived by a guilty plea, and the record affirmatively demonstrated his understanding and waiver of those rights. Although the defendant had a history of mental impairment, his responses during the plea proceeding were coherent and appropriate. To the extent that the defendant relied on post-judgment events and a subsequent psychological evaluation, that material was dehors the record and could not be considered on a direct appeal from the judgment. Contrary to the defendant's contention, the record also reflected that, before accepting the plea, the Supreme Court properly advised him that a plea of guilty could lead to deportation or the denial of naturalization (*People v Peque*, 22 NY3d 168) and confirmed that he had had sufficient opportunity to consult with counsel.
http://nycourts.gov/reporter/3dseries/2019/2019_01619.htm

Plea Cases – Other Issues

People v Syphrett, 3/5/19 – **SEARCH WARRANT / PROPER**
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 and sentencing him to a term of six months. The **First Department** affirmed. The plea court properly denied the defendant's motion to controvert a search warrant that led to the recovery of drugs from his apartment. Probable cause was established via information provided by a previously reliable confidential informant, who made two controlled buys that were reasonably close in time to the warrant application. *See e.g. People v Jaen*, 140 AD3d 594.
http://nycourts.gov/reporter/3dseries/2019/2019_01536.htm

People v Najera, 3/6/19 – **PLEA WITHDRAWAL MOTION / DENIED**
The defendant appealed from a judgment of Rockland County Court, convicting him of 1st degree rape upon his plea of guilty. The **Second Department** affirmed. The defendant's motion to withdraw his plea was denied. The decision to permit a defendant to withdraw a guilty plea rests within the sound discretion of the court and generally will not be disturbed absent an improvident exercise of discretion. When a defendant moves to withdraw a guilty plea, the nature and extent of the fact-finding inquiry rests largely in the discretion of the judge to whom the motion was made, and a hearing will be granted only in rare instances. Denial of the motion without a hearing was proper in the case at bar. The defendant's post-plea statements of innocence were unsubstantiated, conclusory, and belied by the plea proceeding. He acknowledged under oath that he was satisfied with counsel's representation; that he had not been coerced into pleading guilty; and that he was entering the plea freely and voluntarily. The defendant failed to preserve his contentions: that his plea was involuntary, because County Court did not advise him of every constitutional right being forfeited, and because the prosecutor questioned him as part of the factual allocution and the defendant provided only monosyllabic, one-word responses.
http://nycourts.gov/reporter/3dseries/2019/2019_01620.htm

People v Allevato, 3/7/19 – **DEFENDANT'S QUALMS / VALID PLEA**
The defendant appealed from a judgment of Otsego County Court, convicting him of 1st degree rape upon his plea of guilty; and from an order denying his CPL 440.10 motion. The **Third Department** affirmed. As to the defendant's attack on the validity of the plea, the appellate court held that the narrow exception to the preservation requirement did not apply. The record reflected that, when County Court asked the defendant whether he had engaged in sexual intercourse with a person less than age 13, he responded, "Yep. What am I supposed to say? Forced into this." The court responded, "I'm sorry . . . I didn't catch that." Defense counsel then requested a moment to speak with the defendant. After that, the court inquired of the defendant, "Was there something else you wanted to say?" He responded, "Nope." Under these circumstances, the trial court had no duty to further inquire.
http://nycourts.gov/reporter/3dseries/2019/2019_01676.htm

ARTICLE

Immigration Attorneys / "Guerrilla Habeas" Team
DOCUMENTED, 3/6/19
Former Legal Aid Society Attorneys Sarah Gillman and Gregory Copeland have started a two-person immigration team at NSC Community Legal Defense, an affiliate of the New Sanctuary Coalition. The new initiative specializes in rapid-response defense for clients facing imminent deportations or for those with complex cases other attorneys decline to take. The creation came in response to increasing aggressiveness by ICE prosecutors, who often try to have immigrants deported on short notice and despite potential legal avenues for relief. The pair has already taken on over 20 cases since its January founding, including two high-profile cases of immigrants married to U.S. citizens.

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