

U.S. SUPREME COURT

Nielsen v Preap, 3/19/19 – NONCITIZEN DETENTION / NO BAIL HEARING

The INA provision, 8 USC § 1226 (c), addressing potentially deportable noncitizens who committed certain offenses or have ties to terrorism, requires DHS to take those aliens into custody “when...released” from prison and to hold them without a bail hearing until Government authorities decide whether to deport them. The question presented here was whether: (A) the “no-bail-hearing” category encompasses aliens taken into custody years or decades after release; or (B) the category covers only aliens promptly taken into custody when released from prison. In an opinion by Justice Alito, the USSC majority chose (A), whereas Justice Breyer endorsed (B) in a dissent in which Justices Ginsburg, Sotomayor, and Kagan joined. The dissenters pointed out that aliens subject to detention without a bail hearing may have been convicted of minor crimes; after release may have established families and roots in a community; and ultimately may be found eligible for relief from removal. Congress did not likely intend the majority’s interpretation, which will harm fundamental American principles, the dissenters opined.

https://www.supremecourt.gov/opinions/18pdf/16-1363_a86c.pdf

APPELLATE DIVISION

Plea Cases – Immigration Issues

People v Kostyk, 3/20/19 – PEQUE VIOLATION / REMITTAL

The defendant appealed from judgments of Kings County Supreme Court, convicting him of two counts each of 2nd degree burglary and 2nd degree criminal trespass, upon his pleas of guilty. In *People v Peque*, 22 NY3d 168, the Court of Appeals held that, as a matter of “fundamental fairness,” due process requires that a court apprise a noncitizen pleading guilty to a felony of the possibility of deportation as a consequence of the plea of guilty. A defendant seeking to vacate a plea based on this defect must demonstrate that there is a “reasonable probability” that, had the court warned of the possibility of deportation, he or she would not have pleaded guilty and would instead have gone to trial. In the instant case, the record did not demonstrate that Supreme Court apprised the defendant of the possibility of deportation as a consequence of his pleas. Accordingly, the **Second Department** remitted the matter to give the defendant an opportunity to move to vacate his pleas within 60 days, and for a report by the Supreme Court thereafter. In the interim, the appeal was held in abeyance. Appellate Advocates (Kathleen Whooley, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_02118.htm

Plea Cases – Other Issues

People v Golden, 3/19/19 – UNFULFILLED PROMISE / PLEA VACATED

The defendant appealed from a judgment of New York County Supreme Court convicting him of attempted 2nd degree assault. The **First Department** reversed. The defendant was

entitled to vacatur of the plea because a promise of shock incarceration could not be honored. Shock incarceration is only available for persons convicted of controlled substance or marijuana offenses. *See* Penal Law § 60.04 (7). The Center for Appellate Litigation (Claudia Trupp, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_02027.htm

***People v Jackson*, 3/20/19 – COERCION CLAIMS / INSUFFICIENT**

The defendant appealed from a judgment of Westchester County Court convicting him of 2nd degree murder, 2nd degree CPW, and another crime. Although the waiver of his right to appeal was valid, his contention that he should have been allowed to withdraw his plea survived the waiver. The motion was properly denied, however, the **Second Department** held. The record established that the defendant knowingly, voluntarily, and intelligently entered his plea. The contention that the defendant was coerced into pleading guilty was premised on unsubstantiated and conclusory allegations, and belied by his statements under oath at the plea proceeding. Thus, the statements were insufficient to warrant vacatur of his plea or a hearing on the issue. Moreover, the mere fact that counsel may have advised the defendant regarding the risks of trial—including the possibility of consecutive sentences upon conviction—was insufficient to establish coercion. The defendant’s contention that he was deprived of effective assistance was based in part on matter outside the record and thus constituted a “mixed claim.” A CPL 440.10 proceeding was the appropriate forum for reviewing the claim in its entirety.

http://nycourts.gov/reporter/3dseries/2019/2019_02116.htm

***People v Brown*, 3/21/19 – SUPPRESSION WAIVED / IAC UNPRESERVED**

The defendant appealed from a judgment of Essex County Court, convicting him of 3rd degree CPCS and 4th degree CSCS. The **Third Department** affirmed. He waived his right to appeal. In accordance with the terms of the plea agreement, defendant was sentenced as a second felony offender to an aggregate term of 14 years, followed by post-release supervision. On appeal, he claimed that certain evidence obtained by the police via the search and eavesdropping warrants should have been suppressed. Such issue was precluded by his valid waiver of the right to appeal. Notably, County Court advised the defendant that any decisions on pretrial motions would be treated as if they were withdrawn. Furthermore, the written waiver stated that it encompassed any pretrial rulings. The defendant further contended that counsel’s failure to pursue the suppression application deprived him of effective assistance. Such claim was unpreserved, since the defendant did not make an appropriate post-allocation motion. Moreover, the narrow exception to the preservation requirement was inapplicable.

http://nycourts.gov/reporter/3dseries/2019/2019_02178.htm

Trial / 440 Motion

***People v Pendergraph*, 3/22/19 – 440.10 MOTION DENIED / REVERSED**

The defendant appealed from order of the Onondaga County Court which denied his CPL 440.10 motion seeking to vacate a judgment of conviction, upon a jury verdict, of 2nd degree murder and 2nd degree CPW. The Fourth Department reversed and remitted. A hearing was needed to determine whether counsel was ineffective in telling the jury that

the defendant would testify. The defendant's affidavit stated that counsel never discussed with him whether taking the stand would be a good or bad idea, and he never told counsel that he would testify at trial—an account supported by the affirmation of appellate counsel, based on trial counsel's admission that the defendant did not tell him before trial that he would testify. The remittal hearing would afford the defendant an opportunity to prove that trial counsel did not discuss with him whether he would testify before informing the jury that he would do so, and that there was no strategic or tactical reason for telling the jury that the defendant would testify. Hiscock Legal Aid Society (Piotr Banasiak, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_02220.htm

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