

FEDERAL COURT

Portillo v Decker, 3/28/19 – HABEAS VENUE / DISTRICT OF CONFINEMENT

The petitioner was a citizen of El Salvador confined at the Hudson County Correctional Facility in Kearny, New Jersey, pending resolution of removal proceedings. In a writ of habeas corpus seeking an individualized review of his custody, the petitioner contended that venue was proper in the **SDNY**, since the ICE NY field office director was located in Manhattan. The SDNY disagreed and granted the respondents' motion to transfer the petition to the District of NJ. Habeas corpus petitions filed by incarcerated aliens, challenging their physical detention prior to deportation, must be filed in the district of confinement. The official with immediate physical custody of the petitioner was the appropriate respondent, not some other official with ultimate legal control.

Guzman v AG, 3/29/19 – IAC / REMAND

The petitioner sought review of a BIA decision denying deferral of removal under the Convention against Torture (CAT) and finding no ineffective assistance. The **Third Circuit** remanded for further consideration of the latter claim. A citizen and native of the Dominican Republic, the petitioner was admitted to the U.S. on a temporary visitor's visa. In 2015, he pleaded guilty to drug sales crimes, and DHS issued a final order of removal. An asylum officer determined that the petitioner had a reasonable fear of torture in the Dominican Republic. Ultimately, the appellate court found that the petitioner did not meet his burden of establishing that it was more likely than not that he would be tortured if removed. The Third Circuit remanded for consideration of the IAC claim. The IJ listed many pieces of easily obtainable evidence—such as the testimony of the petitioner's wife and mother—that the original counsel could have put forth to corroborate his testimony. The same was true of background materials that could have shed light on the relationship between the drug cartel and the government of the Dominican Republic.

Aguirre-Urbina v Barr, 3/26/19 – TORTURE PROOF / COMPETENCE AND CRIME

The petitioner, a native and citizen of Mexico, petitioned for review of a BIA decision dismissing his appeal from an IJ decision. The IJ had denied the petitioner's motion to terminate removal proceedings based on his mental incompetency. The **Ninth Circuit** held that the IJ did not err by proceeding with the removal hearing after finding him incompetent. The required procedural fairness was provided. However, the BIA committed an error of law in concluding that the petitioner failed to establish that it was likely that he would be tortured if returned to Mexico. The BIA relied on the petitioner's 2014 testimony and failed to consider his 2016 declaration detailing more recent threats. The petition for review as to the CAT claim was granted. The IJ further erred in not considering the petitioner's mental health in determining whether his conviction—for possession with intent to deliver a controlled substance—was a particularly serious crime, which would render him ineligible for withholding of removal. The matter was remanded.

APPELLATE DIVISION

Plea Cases – Immigration Issues

***People v Mohamed*, 4/3/19 – PEQUE VIOLATION / REMITTAL**

The defendant appealed from a judgment of Queens County Supreme Court, convicting him of 3rd degree criminal sale of a controlled substance. The **Second Department** remitted. *People v Peque*, 22 NY3d 168, held that due process requires a court to apprise a noncitizen pleading guilty to a felony of the possibility of deportation as a consequence of the plea. A defendant seeking to vacate a plea based on a *Peque* defect must demonstrate a reasonable probability that he or she would not have pleaded guilty had the court given the requisite warning. In the instant case, the defendant contended that his plea was not valid, because Supreme Court did not deliver a *Peque* warning. To preserve a challenge to the validity of the plea, a defendant generally must move to withdraw the plea or otherwise object to its entry prior to sentencing. A narrow exception exists where there was no reasonable opportunity to object to a fundamental defect which was clear on the face of the record and to which the court's attention should have been drawn. Here the exception applied. At the plea proceeding, the court merely asked counsel if he had discussed with the defendant the potential immigration consequences. Counsel responded: "He is here on a Green Card. We have discussed the immigration consequences." The record did not demonstrate that the plea court mentioned, or that the defendant was otherwise aware of, the possibility of deportation. He had no practical ability to object to the court's inadequate statement. Upon remittal, the defendant would have an opportunity to move to vacate his plea and to show prejudice. Appellate Advocates (Ronald Zapata, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_02557.htm

Plea Cases – Other Issues

***People v Titus*, 4/4/19 – WAIVER OF INDICTMENT / DEFECTIVE**

The defendant appealed from a judgment of Broome County Court. He executed a waiver of indictment and was charged in a SCI with 3rd degree burglary. As part of a global disposition, he pleaded guilty to attempted 3rd degree burglary. The **Third Department** held that, because there was not strict compliance with statutory mandates, the defendant's waiver of indictment was invalid. The challenge was not precluded by the guilty plea, nor was it subject to the preservation requirement. CPL 195.20 requires that a waiver of indictment include the date and approximate time of the charged offense. When filed together, the waiver and SCI may be read as a single document to satisfy statutory requirements. However, here neither document indicated the time of the charged offense. Thus, the waiver of indictment was invalid, and the SCI was jurisdictionally defective, thereby requiring vacatur of the guilty plea, reversal, and dismissal of the SCI. G. Scott Walling represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_02588.htm

***People v Hollmond*, 3/27/19 – PLEA COERCION / RIGHT TO COUNSEL**

The defendant appealed from a judgment of Kings County Supreme Court convicting him of 1st degree manslaughter and 2nd degree attempted murder (two counts). The appeal brought up for review the summary denial of his motion to withdraw his plea of guilty. The **Second Department** remitted for a hearing with new counsel. Before trial, the defendant was housed at prisons 100 to 132 miles from the court. Counsel urged that he be transferred to a downstate facility; and the court so ordered, but DOCCS failed to comply. Despite the defendant's inability to consult with his attorney and defend the case, Supreme Court stated that the trial would commence, regardless of where the defendant was housed. On the next court date, the defendant agreed to plead guilty. Two weeks later at sentencing, he moved to withdraw his plea, contending that he had entered the plea involuntarily. The lower court denied the application without any inquiry. Yet the record substantiated the claim that the plea was effectively coerced by the ongoing violation of the defendant's Sixth Amendment right to counsel. A genuine factual issue existed as to the voluntariness of the plea. Appellate Advocates (Lynn Fahey, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_02354.htm

***People v Danielson*, 3/28/19 – PLEA AND WAIVER / FORFEITED CLAIMS**

The defendant appealed from a judgment of Chenango County Court, convicting him of 2nd degree murder. Following his plea of guilty, the defendant was sentenced to 20 years to life. The **Third Department** affirmed. The appeal waiver was valid and precluded his challenge to the adverse ruling on his pretrial suppression motion; his claim of judicial bias; and his various challenges to the sentence and sentencing proceedings. His challenge to the legal sufficiency of the evidence before the grand jury was forfeited by the guilty plea, as was the claim that the court erred in denying his motion to disqualify the DA's office from prosecuting the case. Although the defendant's contention that the grand jury proceedings were jurisdictionally defective survived his appeal waiver and guilty plea, the contention lacked merit. His remaining contentions regarding the assistance of counsel involved matters outside of record and therefore were more appropriately raised in a 440 motion.

http://nycourts.gov/reporter/3dseries/2019/2019_02388.htm

***People v Spanarkel*, 3/26/19 –VOLUNTARY / INQUIRY ON INTOXICATION**

The defendant appealed from a judgment of New York County Supreme Court convicting him of 2nd degree burglary and sentencing him, as a persistent violent felony offender, to 16 years to life. The **First Department** affirmed. The defendant's challenge to the voluntariness of his plea did not come within the narrow exception to the preservation requirement. The plea allocution established the voluntariness of the plea and contained nothing that cast doubt on the defendant's guilt. To the extent he made a remark that may have suggested a possible intoxication defense and warranted further inquiry by the court, the ensuing inquiry established that the defendant understood he had the right to assert that his intoxication negated an element of the crime.

http://nycourts.gov/reporter/3dseries/2019/2019_02292.htm