FEDERAL COURT

USA v Meza, 4/11/19 – **NO MORAL TURPITUDE / IAC**

The defendant was charged with illegally reentering the U.S. after deportation and with committing two crimes involving moral turpitude (CIMT). In District Court – **SDNY**, he contended that a 2010 removal order was facially deficient because his NY petit larceny conviction was not a CIMT. NY Penal Law did not require a permanent deprivation of property; but at the time of removal, the BIA did require such element for a CIMT. The defendant also asserted that his attorney was ineffective in failing to properly advise him about the facial deficiency of the notice of removal. A defendant subject to removal has a right to due process of law. Under 8 USC § 1326 (d), the defendant may prevail on an IAC claim by showing that counsel's performance was so ineffective as to have impinged on the fundamental fairness of the hearing. Here immigration counsel incorrectly understood NY petit larceny to be a CIMT. There was a reasonable probability that, if properly advised, the defendant would have challenged the notice of removal and have been victorious at the removal proceeding or upon appeal. Given counsel's deficient performance, the defendant did not validly waive instructions by the IJ regarding his rights, or his right to appeal. The defendant's failures to exhaust his administrative remedies and to seek judicial review were excused. For these reasons, his motion to dismiss the indictment was granted.

BIA

M/O Vasquez, 27 I&N Dec. 503 – **KIDNAPPING / NOT AGGRAV. FELONY**

An IJ terminated the instant proceedings, finding that the respondent was not removable under the INA as an alien convicted of an aggravated felony. DHS appealed, and the BIA dismissed the appeal. In 2009, the respondent—a native of Mexico and a LPR—was convicted of the federal crime of kidnapping. DHS contended that kidnapping was an aggravated felony. The BIA disagreed: kidnapping was not enumerated as an aggravated felony. DHS emphasized that some aggravated felonies involved a threat to kidnap, while kidnapping required more serious conduct—the completed act. The BIA was unpersuaded. The statute was not ambiguous, and the plain language could not be disregarded just because the result might be somewhat illogical, as opposed to absurd or bizarre. Many serious offenses are not aggravated felonies. The statute could not be rewritten to achieve a favored outcome.

APPELLATE DIVISION

Plea Cases – Other Issues

People v Peralta, 4/10/19 – **PLEA / INTELLIGENT DECISION**
The defendant appealed from a judgment of Nassau County Court convicting him of 1st degree AUO of a motor vehicle. The **Second Department** affirmed. The defendant contended that his plea was not knowing, voluntary, and intelligent. However, he failed to preserve this contention for appellate review, since he did not move to vacate his plea or otherwise raise this issue before County Court. The exception to the preservation requirement did not apply, because the allocution did not cast significant doubt on his guilt, negate an essential element of the crime, or call into question the voluntariness of his plea. In any event, the Court of Appeals has not held that a plea was effective only if a defendant acknowledged committing every element of the offense or provided a factual exposition for each element. No set catechism was required. It was enough where, as here, the allocution showed that the defendant understood the charges and made an intelligent decision to enter a plea of guilty.
http://nycourts.gov/reporter/3dseries/2019/2019_02723.htm

People v Birch, 4/10/19 – **SUPPRESSION / DENIAL**
The defendant appealed from a Queens County Supreme Court judgment convicting him of 3rd degree CPW. The appeal brought up for review the denial of his motion to suppress physical evidence. The **Second Department** affirmed the judgment of conviction. The defendant's purported waiver of his right to appeal was invalid. Supreme Court never elicited an acknowledgment that the he was voluntarily waiving his right to appeal; and the colloquy did not ensure that the defendant understood the distinction between the waiver and other rights automatically forfeited on a plea of guilty. The court also misstated the law by indicating that the appeal waiver would preclude the defendant from challenging the voluntariness of his plea. Further, the court failed to ascertain whether he was even aware of the waiver's contents. Since the waiver was invalid, it did not preclude review of the suppression ruling. However, Supreme Court properly denied suppression. An officer's question, "Fellas, how are you doing tonight?" constituted a greeting, not a level-one *DeBour* inquiry. The defendant's unprovoked and voluntary act of tossing a switchblade was not in direct response to illegal police action.
http://nycourts.gov/reporter/3dseries/2019/2019_02716.htm

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