

SECOND CIRCUIT

Matthews v Barr, 6/18/19 – BIA / EWC / DISSENT

The petitioner sought review of a BIA decision affirming an IJ ruling, which found him removable. The agency determined that the petitioner's NY convictions for endangering the welfare of a child were crimes of "child abuse, child neglect, or child abandonment" under the INA. The Second Circuit agreed, but one judge wrote a lengthy dissent. The BIA had erred in concluding that the vague state statute was categorically equivalent to the ambiguous federal statute. Supreme Court precedent required an assessment of whether, in applying the state law to the "least of the acts criminalized," there was a "realistic probability" that an individual could be convicted for conduct falling outside the federal definition. Such probability existed here. NY state trial courts convicted defendants of EWC for leaving a sleeping child unattended at home for 15 minutes; directing vulgar remarks at a toddler; and possessing marijuana in proximity to children—all without proof of risk or harm. Thus, for immigration law purposes, the NY and INA crimes are not equivalent. Moreover, there was no evidence that Congress recognized that permanent family separations could be triggered by minor child-rearing lapses. The majority ignored the real application of the NY law and the devastating impact of the decision—the needless and potentially permanent separation of children from their parents.

[http://www.ca2.uscourts.gov/decisions/isysquery/dec3c321-11e4-4156-8f3c-f4b8fe13be35/1/doc/16-](http://www.ca2.uscourts.gov/decisions/isysquery/dec3c321-11e4-4156-8f3c-f4b8fe13be35/1/doc/16-3145_complete_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/dec3c321-11e4-4156-8f3c-f4b8fe13be35/1/hilite/)

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APPELLATE DIVISION

Guilty Plea – Immigration Case

People v Disla, 6/20/19 – MANDATORY DEPORTATION / BUT NO ADVICE

The defendant appealed from a judgment of NY County Supreme Court, convicting him of 3rd degree criminal possession of a controlled substance. The **First Department** held the appeal in abeyance. Although the defendant did not file a CPL 440.10 motion, the record was sufficient to review his ineffective assistance claim, based on counsel's failure to advise the defendant that his guilty plea to an aggravated felony would result in mandatory deportation. The appellate court directed that the defendant should have the opportunity to move to vacate his plea, upon a showing that there was a reasonable probability that he would not have pleaded guilty, had he been made aware of the deportation consequences. While the defendant requested that his conviction be replaced by a conviction under a subdivision of Penal Law § 220.16 that might entail less onerous immigration consequences, the appellate court found such remedy inappropriate and remitted for a hearing. The Center for Appellate Litigation (Mark Zeno, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_04995.htm

Five Recent IAC Reversals

People v Hunter, 6/6/19 – ENHANCED SENTENCE / VACATUR

The defendant appealed from a judgment of Sullivan County Court, convicting him of 2nd degree murder. The **Third Department** held that trial counsel was ineffective for failing to adequately challenge an enhanced sentence, which was imposed based on a finding that the defendant had violated a condition of his plea agreement, by being arrested on new charges prior to sentencing. However, the court did not deliver *Parker* warnings and ensure that the defendant was fully aware of the consequences of being arrested prior to sentencing. The plea court should have given the defendant a chance to withdraw his plea. There was no apparent strategic reason for counsel's failure to challenge the enhanced sentence. Thus, the sentence was vacated and the matter remitted.

http://nycourts.gov/reporter/3dseries/2019/2019_04496.htm

People v Nitchman, 6/6/19 – 440.10 / HEARING ORDERED

The defendant appealed from an order of Saratoga County Court, denying his CPL 440.10 motion to vacate a judgment convicting him of 1st and 2nd degree criminal sexual act. The People made a pre-indictment plea offer more lenient than the one the later accepted. The defendant said that he did not know about the offer and would have accepted it. The **Third Department** found that there was a reasonable possibility that the defendant's allegations were true, and thus County Court should have conducted a hearing. Remittal was ordered. Brian Quinn represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_04501.htm

People v Marshall, 6/6/19 – CONFLICT OF INTEREST / VACATUR

The defendant appealed from a judgment Broome County Court, convicting him of 1st degree robbery and 3rd degree larceny. The **Third Department** reversed in the interest of justice and remitted, based on IAC flowing from a conflict of interest. While informing County Court about the terms of a plea offer, defense counsel said that the ADA had advised him that a number of counsel's former and current clients might be witnesses against the defendant; and if the case went to trial, defense counsel would have a conflict. However, the attorney continued to represent the defendant. The appellate court found that there was a significant possibility of an actual conflict. County Court failed to fulfill its duty to inquire as to whether the defendant understood the risks of counsel's continued representation and chose to waive the conflict. Kevin Jones represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_04499.htm

People v Jones, 6/7/19 – SUB COUNSEL REQUEST / VACATUR

The defendant appealed from a County Court judgment, convicting him of 1st degree burglary. The **Fourth Department** reversed, vacated the plea, and remitted. The plea court violated the defendant's right to counsel when it failed to conduct a sufficient inquiry into his complaint regarding defense counsel's representation. During the plea colloquy, the defendant attempted to inform the court that he was pleading guilty only because he was not receiving effective assistance. The court refused to accept the defendant's pro se letter regarding the matter and did not otherwise allow him to expand on his claim. The court had no basis to completely cut off the discussion without hearing any explanation. The

appellate court rejected the People’s contention that the defendant abandoned his request when he decided to plead guilty, while still represented by the same attorney. After refusing to allow the defendant to articulate his argument, the court gave him an ultimatum to plead guilty or go to trial—in either case, with present counsel. The defendant’s contentions implicated the voluntariness of the plea. The Monroe County Conflict Defender (Kathleen Reardon, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_04543.htm

***People v Edwards*, 6/7/19 – SUB COUNSEL REQUEST / VACATUR**

The defendant appealed from a judgment of Onondaga County Supreme Court, which convicted him of attempted 1st degree murder and other crimes. The **Fourth Department** reversed and ordered a new trial, because the trial court violated his right to counsel by failing to conduct at least a minimal inquiry when the defendant voiced seemingly serious complaints about defense counsel. At a pretrial appearance, the defendant complained that counsel had failed to file discovery demands and omnibus motions. On appeal, the People conceded that defense counsel never filed any omnibus motions. The trial court erred in summarily denying the defendant’s request for substitute counsel without conducting any inquiry, based on its mistaken belief that omnibus motions had been filed. The Hiscock Legal Aid Society (Kristen McDermott, of counsel) represented the appellant.

http://nycourts.gov/reporter/3dseries/2019/2019_04537.htm

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