

IMMIGRATION APPEALS

***Matter of J-R-G-P*, 10/31/18 – NO TORTURE INTENT / REMOVAL DEFERRAL DENIED**

The respondent was a native and citizen of Mexico who entered the U.S. without inspection at an unknown time and place. DHS initiated removal proceedings, and the respondent requested deferral of removal under the Convention Against Torture. The IJ denied the application. It was undisputed that the respondent had mental health problems. The sole issue on appeal was whether the respondent had proven that it was more likely than not that he would be tortured if arrested in Mexico and confined to jail, prison, or a mental health facility. In the BIA's view, the respondent did not meet the test. For an act to constitute torture, it must be specifically intended to inflict severe pain and suffering. There was no clear error in the IJ's finding that the appalling, substandard conditions that the respondent might well endure in Mexico were more likely to result from a lack of resources than from an intent to torture.

<https://go.usa.gov/xPyBf>

APPELLATE DIVISION

Plea Cases – Immigration Issues

***People v Delacruz*, 11/1/18 – PEQUE CLAIM UNPRESERVED / PADILLA CLAIM VIA 440**

The defendant appealed from a judgment of New York County Supreme Court, convicting him of 2nd degree criminal sale of a controlled substance. The **First Department** affirmed. The defendant did not establish that the narrow exception to the preservation requirement applied to his *People v Peque* (22 NY3d 168) claim. Months before his guilty plea, the defendant was informed of his potential deportation by a notice served upon him by the People in the presence of his attorney at arraignment. Thus, the defendant had the opportunity to raise the immigration issue. Further, the court discussed the defendant's deportation at the plea proceeding. The appellate court declined to review his claim in the interest of justice. The defendant also alleged that his counsel provided ineffective assistance regarding the immigration consequences of his plea. *See Padilla v Kentucky*, 559 US 356. The record only reflected the fact that the attorney gave him some advice about the immigration consequences, not the content of the advice. *Cf. People v Doumbia*, 153 AD3d 1139 (content of actual advice given was on record). Because the instant claim involved matters not reflected in the record, it was unreviewable without the benefit of a fuller record via a CPL 440.10 motion.

http://nycourts.gov/reporter/3dseries/2018/2018_07354.htm

Plea Cases – Other Issues

People v Simon, 11/1/18 – FORFEITED RIGHTS NOT EXPLAINED / REVERSAL

The defendant appealed from a judgment of Sullivan County Supreme Court, convicting him of 3rd degree criminal possession of a controlled substance and 2nd degree CPW. On appeal, he asserted that his guilty plea was not knowing, voluntary and intelligent because County Court failed to adequately inform him of the constitutional rights being waived. The **Third Department** agreed. Assuming that the waivers of appeal were valid, the defendant's challenge to the guilty plea survived a valid waiver. However, his argument regarding the plea was unpreserved for appellate review. The defendant's post-plea motion to withdraw his plea was premised on different grounds. The appellate court exercised its interest of justice jurisdiction and reversed. While there was no mandatory catechism for a pleading defendant, there must be an affirmative showing that he or she waived relevant constitutional rights. During the instant proceedings, County Court engaged in an abbreviated colloquy and made only a passing reference to certain rights being forfeited. The plea court did not mention the privilege against self-incrimination or the right to be confronted by witnesses. Moreover, the plea court failed to adequately establish that the defendant had consulted with his counsel about his relinquishment of trial-related rights, making only a vague inquiry into whether defendant had spoken to counsel about his rights. With no affirmative showing that the defendant understood and voluntarily waived his rights, the plea was invalid and had to be vacated. Theodore Stein represented the appellant. http://nycourts.gov/reporter/3dseries/2018/2018_07370.htm

People v Gott, 10/31/18 – GUILTY PLEA UPHELD / MIXED 440 CLAIM

The defendant appealed from judgments of Suffolk County Court, convicting her of 2nd degree burglary, attempted 2nd degree assault, and DWI as a misdemeanor. The **Second Department** affirmed. The claim that the voluntariness of her guilty pleas was impacted by mental illness or the side effects of psychiatric medication was unsupported by the record. Without a hearing, County Court had properly denied the defendant's motion to withdraw her pleas. Further, by pleading guilty, she forfeited review of her CPL 30.30 claim. The waiver of the right to appeal precluded review of an ineffective assistance claim, except to the extent that the defendant contended that deficient representation may have affected the voluntariness of the pleas. Moreover, by pleading guilty, the defendant relinquished complaints regarding flawed representation that did not directly involve the bargaining process. Any viable argument was a "mixed claim." Since the issue could not be resolved without reference to matters outside the record, a CPL 440.10 proceeding was the appropriate vehicle.

http://nycourts.gov/reporter/3dseries/2018/2018_07326.htm

People v Aldous, 11/1/18 – GUILTY PLEA UPHELD / MIXED 440 CLAIM

The defendant appealed from a judgment of Albany County Court convicting him of 2nd degree rape and 3rd degree CPW. The **Third Department** affirmed. County Court explained that the waiver of appeal was separate and distinct from the trial-related rights forfeited. The defendant said that he understood and executed a written waiver in open court. Thus, the waiver was enforceable. His contention that his plea was involuntary was unpreserved by an appropriate post-allocation motion. Further, the defendant did not make

any statements during his allocution that negated an element of the charged crimes or otherwise called into question the voluntariness of his plea. Therefore, the narrow exception to the preservation requirement was inapplicable. The ineffective assistance claim was unpreserved. Moreover, the majority of the arguments as to the voluntariness of his plea and related ineffective assistance claim were based on matters outside the record. Defendant asserted that his counsel provided inadequate advice regarding potential defenses; related erroneous information regarding sentencing exposure; pressured him to accept the plea; and ignored his wishes to proceed to a grand jury and contest the charges. http://nycourts.gov/reporter/3dseries/2018/2018_07371.htm

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