FEDERAL DISTRICT COURT

***Hechavarria v Sessions*, 11/2/18 – LENGTHY DETENTION / DUE PROCESS VIOLATION**
The petitioner, a Jamaican citizen, received CPR status in 1987. When such status was terminated, he was charged with being removable and released to the DHS Alternatives to Detention Program. He was later convicted on assault charges. While the petitioner was incarcerated, ICE added a charge of removability based on the aggregated felony conviction. In July 2013, the petitioner was released from criminal custody and transferred to DHS custody in Batavia. He filed a pro se habeas corpus petition in 2015. Last May, the Second Circuit held that his detention as a criminal alien is governed by 8 USC § 1226 (c). *See Hechavarria v. Sessions*, 891 F.3d 49. In the instant case, the Western District stated that there are constitutional limitations on the length of § 1226 (c) detention. The petitioner's interests implicated not only his freedom, but his life. Necessary medical services to treat his grave health problems were unavailable in Jamaica. Thus, the petitioner faced the choice of detention here or liberty—and perhaps death—elsewhere. While the government contended that the petitioner must be detained because he was dangerous, no individualized determination on that issue was ever made. The clear and convincing standard applied because the individual interests at stake were particularly important and more substantial than mere loss of money. The District Court granted the petitioner's application, concluding that the statute is unconstitutional as applied to him and that the detention violated his due process rights. The government could not continue to detain the petitioner unless a neutral decision-maker determined, by clear and convincing evidence, that the detention necessarily supported a legitimate and compelling regulatory purpose. The decision is attached.

APPELLATE DIVISION

Plea Cases – Immigration Issues

People v Malik, 11/7/18 – **Pre-*Padilla* Case / IAC Hearing Ordered**
The defendant appealed by permission from a Queens County Supreme Court order, which denied his motion pursuant to CPL 440.10 (1) (h) without a hearing. The **Second Department** ordered a hearing. The defendant moved to the United States from Pakistan in 2003 as a LPR. Upon a plea of guilty in 2007, he was convicted of 1st degree reckless endangerment. The defendant completed a program; five years' probation was imposed, consistent with the plea deal; and he did not appeal the judgment of conviction. His 440 motion alleged that he had been deprived of effective assistance by counsel's incorrect statement that he would not be subject to deportation as a consequence of his plea. *Padilla v Kentucky* was inapplicable. But prior to *Padilla*, the Court of Appeals held that inaccurate advice about immigration consequences fell below an objective standard of reasonableness and satisfied the first *Strickland* prong. *See People v McDonald*, 1 NY3d 109.

The defendant affirmed that he rejected an initial plea offer that included incarceration because it carried a risk of deportation. Defense counsel did not dispute such facts, affirming that he had no independent recollection or files to refresh his recollection. On

such record, it could not be said that there was no reasonable possibility that the defendant's allegations were true. *See* CPL 440.30 (4). Moreover, as to the second *Strickland* prong, the defendant's affidavit raised material questions of fact, entitling him to a hearing as to whether it was reasonably probable that, if correctly advised, he would not have pleaded guilty. *See* CPL 440.30 (5). However, Supreme Court properly denied those branches of the 440 motion that sought vacatur because the trial court had failed to properly apprise the defendant of the risk of deportation. Relevant facts appearing on the record were sufficient for review of the claim on direct appeal. *See* CPL 440.10 (2). Labe Richman represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07452.htm

Plea Cases – Other Issues

People v Rosario, 11/9/18 – **PLEA ALLOCUTION RAISES DOUBT / REVERSAL**
The defendant appealed from a judgment of Niagara County Court convicting him of 1st degree sexual abuse (two counts). The **Fourth Department** reversed, vacated the plea, and remitted. Although the defendant's contention survived his valid waiver of the right to appeal, he failed to preserve that contention; he did not move to withdraw the plea or to vacate the judgment of conviction on that ground. The case fell within the rare exception to the preservation requirement. The defendant made a statement during the plea allocution that raised a potentially viable affirmative defense, thereby giving rise to a duty on the part of the court, before accepting the guilty plea, to ensure that the defendant was aware of that defense and was knowingly and voluntarily waiving it. The appellate court concluded that the court's inquiry was insufficient to meet that obligation. Legal Aid Bureau of Buffalo (Tim Murphy, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07564.htm

People v Candelario, 11/8/18 – **PLEA WITHDRAWAL MOTION / DENIED**
The defendant appealed from a judgment of New York County Supreme Court convicting him of 1st degree criminal possession of a controlled substance and sentencing him as a second felony drug offender. The **First Department** affirmed. The plea court providently exercised its discretion in denying the defendant's motion to withdraw his plea. The fact-finding procedures on such motions rest in the discretion of the court. *See People v Fiumefreddo*, 82 NY2d 536. The defendant received a full opportunity to state his claims with the assistance of newly assigned counsel. His contention that he did not understand his obligations under the plea agreement was contradicted by the record. *See People v Frederick*, 45 NY2d 520. The plea colloquy and written plea agreement—both of which were translated for the defendant by an interpreter—spelled out the conditions of the plea; and the defendant acknowledged that he understood such conditions.
http://nycourts.gov/reporter/3dseries/2018/2018_07540.htm

People v Figueroa, 11/8/18 –***BOYKIN* RIGHTS / PLEA UPHELD**
The defendant appealed from a judgment of New York County Supreme Court convicting him of 1st degree criminal contempt. The **First Department** affirmed. The defendant was properly adjudicated a second felony offender. Neither of the 2006 convictions set forth in the predicate felony statement was unconstitutionally obtained. Regarding one of the

convictions, there was an allocution during which the court advised the defendant of the rights being waived (*Boykin v Alabama*, 395 US 238), but which did not result in a guilty plea. When the defendant ultimately accepted the plea three weeks later, the court incorporated the prior allocution by reference, and the defendant acknowledged that he remembered and understood its contents. It would have been the better practice to have conducted a second full allocution. However, the incorporation by reference did not render the plea unconstitutional.
http://nycourts.gov/reporter/3dseries/2018/2018_07543.htm

Family Court – Immigration Issues

Matter of Argueta v Santosi, 11/7/18 – **SIJS PETITION / SPECIAL FINDINGS MODIFIED**
The father appealed from an order of Nassau County Family Court that denied the motion of the subject child and the father to amend a prior special findings order. The **Second Department** modified. The father had filed an Article 6 petition for custody of his child to obtain an order making the specific findings needed to enable the child to petition the US Citizenship and Immigration Services (USCIS) for special immigrant juvenile status (SIJS). The child filed a motion seeking an order making the requisite special findings. Family Court granted the motion. Thereafter, the child submitted a petition for SIJS, which was initially approved. However, USCIS then advised the child of its intention to revoke the approval, based on deficiencies in the special findings order. The child moved to amend the findings, and the father joined in the motion. Family Court denied the application. The father was aggrieved by the denial. The appellate court amended the special findings order to clarify that the basis for Family Court's jurisdiction was Family Court Act § 651 (a) and to specify that it would not be in the child's best interests to be returned to El Salvador, because the mother was unable to protect the child from harm by gang members there who had made threats of violence. The special findings order properly set forth the basis for its finding that reunification of mother and child was not viable on the ground of parental neglect. Bruno Bembi represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_07424.htm

APPELLATE TERM – SECOND DEPT.

People v Serrano, 11/2/18 – ***BOYKIN* RIGHTS / PLEA VACATED**
The defendant was charged in an accusatory instrument with, among other things, common law DWI and DWAI. In 2010 in Kings County Criminal Court, he pleaded guilty to the charges. During the plea allocution, there was no discussion of the constitutional rights waived. On appeal, the defendant contended that his plea was insufficient under *Boykin v Alabama*, 395 US 238. Appellate Term dismissed the appeal without prejudice to a motion to reinstate the appeal should defendant, who had been deported, returned to the court's jurisdiction. The Court of Appeals reversed and remitted for consideration of the merits. *People v Harrison*, 27 NY3d 281. In the instant case, Appellate Term reversed the judgment of conviction. The defendant failed to preserve his claim by moving to withdraw his plea. However, the circumstances of the plea did not indicate that the defendant was aware of, and understood, the rights he was relinquishing by pleading guilty, warranting a

reversal in the interest of justice. Notwithstanding the fact that defendant has served his sentence, a penological purpose would be served by reversal and remittal. Legal Aid Society, NYC (Amy Donner, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2018/2018_51547.htm

CYNTHIA FEATHERS, Esq.
Director of Quality Enhancement
For Appellate and Post-Conviction Representation
NY State Office of Indigent Legal Services
80 S. Swan St., Suite 1147
Albany, NY 12210
Office: (518) 473-2383
Cell: (518) 949-6131