

## FEDERAL DISTRICT COURT

### *Joseph v Decker*, 11/21/18 – DUE PROCESS / SUPPLEMENTAL BOND HEARING

The petitioner, a citizen of Haiti and a LPR of the US, was arrested and detained when DHS charged him as removable for having committed an aggravated felony. For more than 14 months since then, he has been in civil detention. Meanwhile, a US Supreme Court decision precluded the primary reasoned legal basis for seeking removal, and an IJ granted the petitioner's request to terminate removal proceedings. DHS is presently appealing the IJ's decision to the BIA. This case is about whether, and the conditions under which, DHS may continue to detain the petitioner during the pendency of that appeal. The **Southern District** Court held that, as a matter of procedural due process, the petitioner was entitled to a supplemental bail hearing at which DHS must bear the burden of proving by clear and convincing evidence that his continued detention is reasonably related to valid immigration purposes.

## APPELLATE DIVISION

### Plea Cases – Immigration Issues

#### *People v Blackman*, 11/21/18 – HEARING NEEDED / FAILURE TO CONVEY PLEA OFFER

The defendant appealed from an order of Broome County Court which denied, without a hearing, his CPL 440.10 motion to vacate the judgment convicting him of the several drug possession crimes. He asserted an ineffective assistance claim based on the failure of defense counsel to apprise him of the potential immigration consequences of a conviction on the subject charges and to explore, negotiate, and procure an immigration-friendly plea offer. The **Third Department** held that the defendant's affidavit alleged sufficient facts which could establish ineffective assistance. The ADA's submission demonstrated that the People offered defendant a plea deal that did not expose him to deportation and that there was a reasonable likelihood that, had defendant accepted the offer, neither the People nor County Court would have blocked the agreement. Instead, the defendant was convicted after a jury trial. There was nothing to controvert the defendant's claim that his counsel did not present him with any plea offer. A hearing was warranted. The defendant's persistent claims of innocence did not undermine any such conclusion. James Sacco represented the appellant.

[http://nycourts.gov/reporter/3dseries/2018/2018\\_07982.htm](http://nycourts.gov/reporter/3dseries/2018/2018_07982.htm)

#### *People v Tejada*, 11/21/18 – PEQUE AND PADILLA CLAIMS / CONVICTION AFFIRMED

The defendant appealed from a judgment of New York County Supreme Court convicting him of 3<sup>rd</sup> degree criminal sale of a controlled substance. Previously, the **First Department** held the appeal in abeyance to afford the defendant the opportunity to demonstrate a reasonable probability that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea. A hearing was held. Based on the evidence adduced, the appellate court agreed with the hearing court that defendant did not meet that

burden, finding no basis for disturbing the hearing court's credibility determinations. The evidence of strong family ties to the United States, and the defendant's own testimony that he was not advised by counsel or the court of the immigration consequences of his negotiated plea, were outweighed by the strength of the evidence against him in the underlying drug case, the potential for a life sentence, and the favorable terms of the disposition.

[http://nycourts.gov/reporter/3dseries/2018/2018\\_07930.htm](http://nycourts.gov/reporter/3dseries/2018/2018_07930.htm)

## Plea Cases – Other Issues

***People v. Matteson***, 11/21/18 – **INEFFECTIVE ASSISTANCE / NO SPEEDY TRIAL MOTION**  
Clinton County Supreme Court's denial of the defendant's CPL 440.10 motion, without a hearing, was error. The defendant argued that he was deprived of effective assistance because his counsel failed to move to dismiss the indictment based on a violation of his statutory speedy trial rights. There is ordinarily no strategic reason for counsel to fail to make a dispositive motion that would result in dismissal of the charges with prejudice. The **Third Department** held that, because the People did not conclusively establish their entitlement to success on a speedy trial motion, a hearing was necessary to determine whether defense counsel consented to certain adjournments. The challenged order was reversed and the matter was remitted. Lisa Burgess represented the appellant.

[http://nycourts.gov/reporter/3dseries/2018/2018\\_07976.htm](http://nycourts.gov/reporter/3dseries/2018/2018_07976.htm)

***People v Brassard***, 11/21/18 – **DEFECTIVE PLEA / NARROW PRESERVATION EXCEPTION**  
The defendant appealed from a Clinton County Court judgment convicting him of 1<sup>st</sup> degree predatory sexual assault against a child. The defendant contended that his guilty plea must be vacated because he negated an essential element of the crime. At sentencing, defendant stated that the sexual conduct started when the victim was 13, not 12, years old. Such statement did indeed negate the element that the victim was under the age of 13, yet County Court did not make any further inquiry or give the defendant an opportunity to withdraw his plea prior to proceeding to sentencing. The **Third Department** reversed the judgment and vacated his plea. Adam Van Buskirk represented the appellant.

[http://nycourts.gov/reporter/3dseries/2018/2018\\_07978.htm](http://nycourts.gov/reporter/3dseries/2018/2018_07978.htm)

***People v Busch-Scardino***, 11/21/18 – **SCI / JURISDICTIONAL DEFECT**  
The defendant appealed from a judgment of Schenectady County Court convicting him of aggravated criminal contempt. She agreed to be prosecuted by an SCI, but argued that the parties must strictly comply with the statutory requirements to waive indictment and that the waiver omitted the approximate time and place of the alleged offense. The **Third Department** held that the waiver was thus invalid, and the related SCI was jurisdictionally defective. The judgment of conviction was reversed, and the SCI was dismissed. Brian Callahan represented the appellant.

[http://nycourts.gov/reporter/3dseries/2018/2018\\_07979.htm](http://nycourts.gov/reporter/3dseries/2018/2018_07979.htm)

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