CRIMINAL

SECOND CIRCUIT

DECISION OF THE WEEK

Doe v USA, 2/14/19 – **CORAM NOBIS GRANTED / IMMIGRATION MISADVICE**

Petitioner Doe pleaded guilty to an aggravated felony. When he applied to renew his green card, he was placed in removal proceedings. Thereafter he filed a writ of coram nobis, alleging that counsel had erroneously assured him that his plea should not result in removal. The petition also set forth an earlier statement in which counsel admitted ignorance of immigration law and the mandatory deportation consequences of the conviction. After initially opposing the petition, the Government changed course and opined that the petitioner received ineffective assistance. Yet the District Court denied the petition. The Second Circuit reversed. The District Court failed to apply the proper standard: (1) whether circumstances compelled relief to achieve justice; (2) whether sound reasons existed for the failure to timely seek relief; and (3) whether the petitioner continued to suffer legal consequences that the writ could remedy. Ineffective assistance in plea negotiations can compel relief. The petitioner was prejudiced, as shown by undisputed proof about his conversations with counsel, and by his history in the U.S., family circumstances, and gainful employment—all of which signaled his strong desire to remain here. Further, the record established a reasonable probability that the prosecution would have accepted, and the court would have approved, a deal that had no adverse immigration impact. Misrepresentations by Government agents justified the petitioner's delay in seeking relief. For all these reasons, the petition was granted, and the plea and conviction were vacated. The reviewing court was troubled by the changing positions taken by the Government, which upon appeal opposed the coram nobis petition. The court was reminded of then Attorney General Robert F. Kennedy's declaration: "It is…not the Department of Prosecution but the Department of Justice…The interest of the Government…is not that it shall win a case, but that justice shall be done." *See Berger v U.S.*, 295 US 78, 88.
http://www.ca2.uscourts.gov/decisions.html

Orlando v Nassau County DA, 2/13/19 – **HABE GRANT / CONFRONTATION CLAUSE**

In 2004, Bobby Calabrese, a runner for an illegal betting operation, was shot in the back of the head. Police interviewed the petitioner and Herva Jeannot. Jeannot confessed to the shooting and said the petitioner hired him to do it to avoid paying a debt. Both were charged with murder. The trials were severed. But the petitioner's right to confront the witnesses against him was violated when the jury learned, via a detective's testimony, of the statement by Jeannot, who did not testify. The petitioner was convicted. On appeal, the Second Department affirmed, and the Court of Appeals denied leave. The petitioner pro se filed a habeas corpus petition in District Court – EDNY, which denied the petition. The Second Circuit reversed, agreeing with the petitioner's arguments: (1) since the petitioner could not cross-examine Jeannot, the detective's testimony recounting Jeannot's statement violated his Confrontation Clause right; (2) the Second Department's ruling was objectively unreasonable; and (3) the error was not harmless. When a non-testifying witness's confession implicates the defendant, a limiting instruction is ineffective. Clearly,

the Confrontation Clause was violated here under *Bruton v U.S.*, 391 US 123. The risk that the jury would consider Jeannot's statement for its truth was too great to allow the jury to hear it, absent the opportunity to cross-examine Jeannot. The testimony about Jeannot's statement must have had a powerful effect on the jury. The District Court was directed to issue a writ, unless within 60 days the DA took steps to retry the petitioner. One judge dissented. Jane Simkin Smith represented the appellant.
http://www.ca2.uscourts.gov/decisions.html

NY COURT OF APPEALS

MHLS v Sullivan, 2/14/19 – **SEX OFFENDERS / TREATMENT MEETINGS**
The Mental Hygiene Law does not mandate, upon a respondent's request, the presence of assigned MHLS counsel at treatment planning meetings for Article 10 respondents placed in a Sex Offender Treatment Program at a secure treatment facility. MHLS counsel is not entitled to be given an interview and an opportunity to participate in such meetings based on an attorney-client relationship. When a treatment plan is prepared or revised, the patient, as well as individuals falling within two categories, "shall be interviewed and provided an opportunity to actively participate in such preparation or revision": (1) "an authorized representative of the patient, to include the parent or parents if the patient is a minor" and; (2) "upon the request of the patient [16] years of age or older, a significant individual to the patient including any relative, close friend or individual otherwise concerned with the welfare of the patient, other than an employee of the facility." MHLS counsel did not fit in either category. Judge Stein wrote the opinion. Judge Wilson dissented.
http://www.nycourts.gov/reporter/3dseries/2019/2019_01122.htm

SECOND DEPARTMENT

People v Costan, 2/13/19 – **DENIAL OF ADJOURNMENT / ERROR**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 1st degree robbery and other crimes, upon a jury verdict. The appeal brought up for review the denial of a motion to suppress. The Second Department remitted for consideration of suppression issues. The appeal implicated the defendant's constitutional right to effective assistance at the suppression hearing—a crucial step in a prosecution that often spells the difference between conviction or acquittal. Supreme Court erred in denying an adjournment. Prior to the hearing, counsel had acted as advisor to the pro se defendant. At the court's urging, counsel agreed to represent the defendant at the suppression hearing, but said that he had not had an adequate opportunity to review voluminous discovery material. Appellate Advocates (Kathleen Whooley, of counsel) represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01089.htm

People v Carryl, 2/13/19 – **ORDER OF PROTECTION / ADJUSTMENT**
The defendant appealed from a judgment of Kings County Supreme Court, convicting him of 3rd degree burglary, upon his plea of guilty. The Second Department affirmed. The defendant's contentions regarding the final order of protection issued at sentencing survived his appeal waiver. However, the contentions were unpreserved, since the

defendant did not raise the issues at sentencing or move to amend the final order of protection. The appellate court declined to invoke its interest of justice jurisdiction, since a defendant seeking an adjustment of an order of protection should first request relief from the issuing court and resort to the appellate courts only if necessary.
http://nycourts.gov/reporter/3dseries/2019/2019_01088.htm

People v Murray, 2/13/19 – ***ANDERS* BRIEF / APPEAL WAIVER / NO MERIT**
The defendant appealed from a judgment of Queens County Supreme Court, convicting him of attempted 2nd degree assault, upon his plea of guilty. The Second Department was troubled that the waiver of the right to appeal was not discussed in the *Anders* brief filed by assigned counsel; but it acknowledged that the waiver had no impact on the relevant issue—the voluntariness of the plea. The court revisited *Matter of Giovanni S. (Jasmin A.)*, 89 AD3d 252, which explained that an appellate court considering an *Anders* brief must determine whether there is an adequate discussion of the facts, issues, and law; and if so, conduct an independent review to discern whether any nonfrivolous issues exist. In the last two years, about one-fourth of *Anders* briefs have failed to satisfy the *Giovanni S.* test, thus resulting in the assignment of new appellate counsel.
http://nycourts.gov/reporter/3dseries/2019/2019_01101.htm

People v Harbison, 2/13/19 **– *ANDERS* BRIEF / NEW COUNSEL ASSIGNED**
The defendant appealed from a judgment of Suffolk County Supreme Court, convicting him of 1st degree vehicular manslaughter and another crime, upon his plea of guilty. Assigned appellate counsel submitted an *Anders* brief and moved to withdraw as counsel. The Second Department granted the motion, but concluded that nonfrivolous issues existed (including whether the sentence was lawful) and assigned new counsel.
http://nycourts.gov/reporter/3dseries/2019/2019_01094.htm

FAMILY

SECOND DEPARTMENT

Matter of Janczewski v Janczewski, 2/13/19 – **ATTORNEY / DISQUALIFIED**
The wife appealed from an order of Suffolk County Family Court, which dismissed her family offense proceeding. The Second Department reversed; granted her application to disqualify the husband's counsel and his law firm; and remanded for further proceedings before a different referee. The wife established that an associate with the law firm that had previously represented her in the pending divorce action—and with whom she had discussed details of the underlying family offense incident—became associated with the law firm representing the husband in the divorce and the instant proceeding. An irrebuttable presumption of disqualification arose from her showing: the prior attorney-client relationship, substantially related matters of the representations, and materially adverse interests of the current and former client. The appellate court further noted that Family Court erred in determining that the wife failed to establish a prima facie case of the family offense of 3rd degree assault. In determining a motion to dismiss, the evidence must be accepted as true and given the benefit of every reasonable inference. The court failed to

apply this standard. The wife had established a prima facie case. Del Atwell represented the appellant. On February 13, the Second Department issued a related decision, *Janczewski v Janczewski*, in which the husband appealed from a Supreme Court granting the wife's motion to disqualify the law firm representing him in the divorce action. The appellate court affirmed. The wife represented herself.
http://nycourts.gov/reporter/3dseries/2019/2019_01072.htm
http://nycourts.gov/reporter/3dseries/2019/2019_01062.htm

Matter of Lucas F. V. (Jose N. F.), 2/13/19 – **SIJS / REVERSED**
In a guardianship proceeding pursuant to Family Court Act Article 6, the child appealed from an order of Nassau County Family Court, which denied his motion seeking an order making specific findings to enable him to petition for special immigrant juvenile status. The Second Department reversed; granted the motion; and found that reunification of child and father was not viable due to parental neglect, and that returning to El Salvador would not benefit the child. When the child lived with the parents there, the father physically mistreated the mother and child; and he provided no financial support for the child. The child also testified that Salvadoran gang members assaulted him and would have killed him, if not for the police. Binder & Schwartz represented the appellant.
http://nycourts.gov/reporter/3dseries/2019/2019_01079.htm

OTHER MATTERS

COURT NOTES / SECOND DEPARTMENT / ***NYLJ*****,** 2/13/19
Notice of Change of Circumstances – Responsibility of Counsel
Attorneys with causes pending in the Second Department must notify the court immediately when (1) a matter or any issue therein has been settled, (2) a matter or any issue therein has been rendered moot, or (3) a cause should not be calendared because of the death of a party, bankruptcy or other appropriate event (*see*, 22 NYCRR 1250.2 [c]). Any such notification shall be followed by an application for appropriate relief. Failure of counsel to promptly notify the court could result in the imposition of sanctions. Notice may be sent to the Clerk of the Court by facsimile transmission to (212) 419-8457 or by e-mail to ad2clerk@nycourts.gov.
Calendaring Conflicts
Attorneys should notify the court, by letter filed at the same time as their brief, of any dates on which they will be unavailable for oral argument. Such information should be updated as new commitments arise. The court is now in the process of preparing calendars for the upcoming months. Attorneys who have requested oral argument on causes that have not yet been calendared should take the opportunity to inform the court of the dates of their unavailability during those months because of religious holidays, vacations, family or work commitments, etc. Such information may be sent by facsimile transmission to the attention of the court's calendar clerks at (646) 963-6460, or by e-mail to AD2-Calendars@nycourts.gov. Once calendared, a cause will not be removed absent unusual circumstances (see, 22 NYCRR 670.15 [d]).

SECOND CIRCUIT NOMINEES GRILLED, *NYLJ*, 2/13/19
A Senate Judiciary Committee panel recently sharply questioned two nominees for the Second Circuit. Some Democrats decried the diminished role of home-state senators in the selection of circuit court picks. One nominee, Michael Park, a partner at Consovoy McCarthy Park, faces sharp opposition from Democrats over his firm's deep ties to the conservative legal establishment. Also nominated was Joseph Bianco, who joined the EDNY bench in 2006 as an appointee of President George W. Bush, after serving as a deputy assistant attorney general in the Justice Department's Criminal Division.

Caseloads / The Untold Story
On February 3, the New York Times published an article, "One Lawyer, 194 Felony Cases, and No Time." A letter to the editor submitted in response but not published is set forth below.
TO THE EDITOR:
This article highlighted the reality that public defenders cannot provide effective representation when they are saddled with grossly excessive caseloads. No lawyer can be effective without adequate time and resources; and that time and those resources cost money. Many people believe the problem is intractable. It is not. One state has enacted bold laws and provided significant funding to attack the crisis of excessive public defense caseloads. That state is New York. In December 2016, as part of a lawsuit settlement, the state Office of Indigent Legal Services produced Caseload Standards that dramatically reduced the number of cases that public defense attorneys may be assigned in five counties. In 2017, those Standards were extended statewide at state expense, under a five-year plan for full compliance by 2023 at an estimated annual cost of $250 million. Robust progress backed by full state funding is underway. In New York, excessive public defense caseloads will be eliminated, and defendants will receive the effective representation guaranteed by the Sixth Amendment.
William J. Leahy, Director, NYS Office of Indigent Legal Services

Criminal Appeals / WHO IS GRANTING LEAVE
The New York Court Watcher Blog
PROF. VINCENT BONVENTRE, 2/12/19 and 2/4/19
Whether the NY Court of Appeals hears a criminal appeal is decided by one Judge. Criminal leave applications (CLA) year are distributed randomly and equally among the judges, with each being assigned to about 300 applications per year. In granting leave, some judges are far more generous than others. The one-judge approach is inequitable, with the outcome depending largely on the luck of the draw regarding who is assigned. The number of CLA granted in 2018 are as follows: Rivera – 13; Wilson – 10; DiFiore – 4; Fahey – 4; Feinman – 3; Stein – 1; Garcia – 1. No wonder bar organizations seek a change in the system. The annual totals have sometimes changed dramatically from one period to another. CLA grants dropped by half a few years into the Kaye Court, following Governor Pataki's harsh criticism of the court as being soft on crime and too liberal. Years later, CLA grants surged in the Lippman Court. Most recently, the numbers have again fallen deeply under Chief Judge DiFiore. In these first few years of the DiFiore Court, the annual totals are less than half what they were with Lippman, and are even below the annual totals of the late Kaye era. The leave-grant rates of Judges Rivera and Wilson are more in line with

the Court of Appeals' record over the past three decades than the rates of other current judges. If the other judges had similar rates, there would be 80 CLA grants each year, as compared to the annual averages of 98, 76, and 87 for the Wachtler, early Kaye, and Lippman eras, respectively.
https://protect2.fireeye.com/url?k=5eca670f-02ec5f31-5ec89e3a-000babda0031-a67224a74589ea98&u=http://www.newyorkcourtwatcher.com/2019/02/nycoa-criminal-appeals-whos-granting.html
https://protect2.fireeye.com/url?k=6d0a0bd4-312c33ea-6d08f2e1-000babda0031-b34cd3b2668c9b0d&u=http://www.newyorkcourtwatcher.com/2019/02/nycoa-criminal-appeals-part-2-annual.html

Bail Reform / DEBATE CONTINUES
BY DAN M. CLARK, *NYLJ*, 2/13/19
Bail reform remains the most challenging issue for lawmakers in Albany, as they negotiate a comprehensive package of criminal justice reform, expected to be approved later this month. Democrats, who control both houses, are working out how courts will decide who should be incarcerated ahead of their trial and who should be released if cash bail is eliminated or significantly limited. The New York Justice Task Force issued a report recommending that most defendants facing misdemeanor and nonviolent felony charges be released before trial either without bail or the least restrictive form of bail possible. The report recommended an exception where a defendant is facing a life sentence or a nonviolent Class B felony that carries a mandatory state prison sentence. Bail has historically been used by prosecutors as an incentive for the accused to appear in court. Many defendants do not have the resources to pay bail.
BY PAUL SCHECTHMAN, *NYLJ*, 2/13/19
Governor Cuomo's proposed bail legislation is a progressive step that would eliminate monetary bail for low-level offenders. But the devil is always in the details, which should be examined closely. The Governor proposes that either a defendant is released under non-monetary conditions or he is detained. Non-monetary conditions can be imposed only to help ensure the defendant's appearance in court. Pretrial detention is available for a limited class of offenders, whereas for certain serious offenses, the defendant must prove that he does not pose a current threat. The Governor's proposal would keep defendants from languishing on low cash bail for nonviolent offenses; and that is a cause for celebration. But bail reform is complicated, and eliminating all monetary bail and sharply limiting the cases that are detention-eligible may go too far.

Lawful Permanent Residents Also May Be Affected by *Suazo*
LETTER TO EDITOR, *NYLJ*, BY ANGAD SINGH, 2/13/19 BY
I write to inform you that there is a grave error in the article titled "NY Gives Birth to Non-Citizens' Right to a Jury Trial if Deportation Possible," by Joseph D. Nohavicka, published February 11, 2019. Specifically, the article claims that, under the recent case of *People v. Suazo*, "The defendant has the burden to prove that he or she is in the country illegally." This is severely misleading because it is not just people who are here without status whose ability to avoid deportation may be affected by a criminal conviction. Crucially, many people with status, including Lawful Permanent Residents, may be rendered deportable by certain misdemeanor convictions. Indeed, even certain violations can be problematic. As a

criminal appellate lawyer focusing on non-citizen representation, I have noticed a common misconception that a misdemeanor conviction is somehow irrelevant for those with legal status. This article strengthens that dangerous myth. In short, the *Suazo* case placed the burden on the defendant to show that the charged crime is a deportable offense given the defendant's status (whatever that may be).
Angad Singh is a staff attorney at Appellate Advocates.

Family Court / IMMIGRATION CONSEQUENCES
Adverse immigration consequences can flow from Family Court dispositions, including orders of protection and violations of such orders. An OCA Advisory Council has produced a helpful memo and chart (attached). Below are links to the memo; the Feb. 11 NYSDA *NEWS PICKS* discussing the memo; and information regarding Regional Immigration Assistance Centers.
https://protect2.fireeye.com/url?k=c31eca45-9f38f27b-c31c3370-000babda0031-ae7606d335cec70c&u=http://immigrants.moderncourts.org/wp-content/uploads/sites/2/2017/12/AdverseConsequences-GuidanceMemoCharftGlossary1.pdf
https://myemail.constantcontact.com/News-Picks-from-NYSDA-Staff--February-11--2019.html?soid=1111756213471&aid=z0VeTzHBaS4
https://www.ils.ny.gov/content/regional-immigration-assistance-centers

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