



The Commonwealth of Massachusetts

Committee for Public Counsel Services

Immigration Impact Unit

21 McGrath Highway, Somerville, MA 02143

TEL: 617-623-0591
FAX: 617-623-0936

ANTHONY J. BENEDETTI
CHIEF COUNSEL

WENDY S. WAYNE
DIRECTOR

A Practice Advisory on *Commonwealth v. Clarke*¹

I. Introduction

On June 17, 2011, the Supreme Judicial Court of Massachusetts (SJC) decided *Commonwealth v. Clarke*, 460 Mass. 30 (2011), interpreting the U.S. Supreme Court decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010) and clarifying a number of issues left unresolved by *Padilla*. In *Clarke*, the Court addressed the retroactivity of *Padilla* as well as what the defendant is required to show to prove prejudice. The decision provides a clear framework for *Padilla* motions filed in Massachusetts state courts. This advisory discusses the *Clarke* case and its implications for post-conviction claims of ineffective assistance of counsel based on *Padilla*.

II. The *Clarke* Decision

The *Clarke* decision arises from a motion to vacate based on ineffective assistance of counsel under *Padilla*. In 2005, the defendant pled guilty to two counts of possession with intent to distribute cocaine in exchange for the Commonwealth's agreement to drop two counts of school zone violations, thereby significantly reducing the mandatory sentence he would face. The defendant was sentenced to two years in the house of correction, with five months to serve and the balance suspended. These convictions constituted aggravated felonies, the most serious category of offenses for immigration purposes, which result in nearly automatic deportation. In 2009, Immigration and Customs Enforcement (ICE) initiated removal proceedings against the defendant.

In April 2010, the defendant filed a motion to vacate alleging ineffective assistance of counsel based on *Padilla* due to his trial attorney's failure to properly advise him of the immigration consequences of his plea. After the motion was denied and the case appealed, the SJC transferred the case *sua sponte* from the Appeals Court.

a. Retroactivity

Because the defendant pled guilty prior to *Padilla*, the SJC first addressed whether the decision in *Padilla* applied retroactively. The Court reviewed U.S. Supreme Court jurisprudence on retroactivity and explained that although a new rule generally may not be applied retroactively,

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Padilla was not a new rule but simply the application of new facts to an established general standard, namely, the standard of ineffective assistance of counsel under the Sixth Amendment as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Clarke*, 460 Mass. at 37 (“there is no question that the holding in *Padilla* is an extension of the rule in *Strickland*, which articulated the two steps required for establishing ineffective assistance of counsel.”) The SJC reached this conclusion in part by examining the reasoning and language of *Padilla*, finding that “the Justices themselves assumed their holding would be retroactively applied.”² However, while finding *Padilla* to apply retroactively to the defendant’s 2005 conviction, the SJC limited the scope of retroactivity by holding that *Padilla* only applies to convictions obtained after April 1, 1997. This is the effective date of the second of two major immigration bills that were passed in 1996, which greatly expanded the categories of offenses that cause deportability and severely curtailed judicial discretion and forms of relief from removal [the Antiterrorism and Effective Death Penalty Act (AEDPA) went into effect on April 24, 1996, and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) went into effect on April 1, 1997].³

b. Ineffective Assistance of Counsel

After finding that *Padilla* could be applied retroactively to the defendant’s case, the SJC turned to the merits of the motion to vacate. The standard for ineffective assistance of counsel was set forth by the Supreme Court in *Strickland v. Washington*, 466 U. S. 668 (1984) and adopted in Massachusetts in *Commonwealth v. Saferian*, 366 Mass. 89 (1974). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show 1) that trial counsel’s representation “fell measurably below that which might be expected from an ordinary fallible lawyer,” and 2) that such deficient representation “likely deprived the defendant of an otherwise available, substantial ground of defence.” *Id.* at 96.

1. *Deficient performance*

Padilla held that defense counsel must inform a defendant of the immigration consequences stemming from a plea prior to resolving a case. In *Clarke*, the SJC found that counsel’s failure to

“ascertain that the defendant was not a U.S. citizen may be sufficient to satisfy the first prong of the *Saferian* standard because effective representation requires counsel to gather at least enough information to represent him....If counsel was unaware of her client’s immigration status when she represented him...it is highly unlikely that she ever informed him that his guilty pleas carried a substantial risk of deportation.”

Clarke, 460 Mass. at 46. Based on the defendant’s affidavit and the affidavit of trial counsel, which both alleged that trial counsel did not know the defendant was not a U.S.

² In *Padilla*, the Supreme Court discussed whether the decision would open the “floodgates” or disturb convictions “already obtained.”

³ On July 28, 2011, counsel for the defendant filed a petition for rehearing in *Clarke* requesting that the decision be changed to apply *Padilla* retroactively to April 24, 1996, the effective date of AEDPA, because convictions for many categories of offenses obtained after that date subject defendants to virtually mandatory deportation due to AEDPA’s abolition of certain forms of relief.

citizen, the court found that counsel's representation had fallen below an objectively reasonable standard, thus satisfying the first prong of ineffective assistance of counsel under *Strickland* and *Saferian*.

2. Prejudice

In order to satisfy the "prejudice" prong of *Saferian*, the defendant must also show that, but for counsel's errors, the defendant would have done something differently. In *Padilla*, the Supreme Court ruled only on the first prong, deficient performance, because the lower court had not reached the issue of prejudice. The Court remanded the case back to the trial court for a ruling on prejudice consistent with the opinion.

In *Clarke*, the SJC addressed the prejudice prong and found that in the context of immigration advice, the defendant could establish prejudice in any of the following ways:

- "1) he had an available, substantial ground of defense, that would have been pursued if he had been correctly advised of the dire immigration consequences attendant to accepting the plea bargain;
- 2) there is a reasonable probability that a different plea bargain (absent such consequences) could have been negotiated at the time, or
- 3) the presence of "special circumstances" that support the conclusion that he placed, or would have placed, particular emphasis on immigration consequences in deciding whether or not to plead guilty."

Clarke, Mass. at 47-48 (internal citations omitted). The SJC found that the defendant in this case had not alleged sufficient prejudice under any of the above scenarios. Therefore, his motion to vacate was denied.

In two footnotes, the SJC addressed additional issues regarding prejudice. First, in footnote 19, the Court noted that it may be rational for a defendant to "take his chances" at trial if acquittal is the only way to avoid deportation. The Court acknowledged that this could remain true even if losing at trial would result in a much longer sentence than what the defendant was facing on a plea. Second, footnote 20 states that receipt of judicial immigration warnings during a plea colloquy, pursuant to M.G.L. ch. 278, § 29D, and the written warning contained in the tender of plea form are inadequate substitutes for defense counsel's obligation to advise the defendant about the specific immigration consequences that might arise from a plea. The Court said that although the existence of both may be relevant to the prejudice prong, they are not dispositive and do not relieve defense counsel's duty under the Sixth Amendment.

III. Conclusion

Padilla was a landmark case with great significance to noncitizen defendants; however it left a number of key issues unresolved. Two of the most pressing issues in the wake of *Padilla* are the retroactive effect of the decision and what is necessary to establish prejudice in order to prevail on a claim of ineffective assistance of counsel. The *Clarke* decision provides clear guidance on both issues for noncitizens convicted of Massachusetts criminal offenses.