



The Commonwealth of Massachusetts

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Practice Advisory on the Retroactivity of *Padilla* in Massachusetts: *Commonwealth v. Sylvain*, 466 Mass. 422 (2013)

I. Introduction

On September 13, 2013, the Massachusetts Supreme Judicial Court (SJC) held in *Commonwealth v. Sylvain*, 466 Mass. 422 (2013), that the Sixth Amendment duty of defense counsel to accurately advise noncitizen clients of immigration consequences, as announced in *Padilla v. Kentucky*, 559 U.S. 356 (2010), is retroactive under Massachusetts common law for convictions obtained after April 1, 1997. The SJC further found a separate duty to properly advise noncitizen defendants under art. 12 of the Massachusetts Declaration of Rights and found this right also to be retroactive.

Sylvain is the first decision by a state appellate court (and the only one to date) to find *Padilla* retroactive under state law after the U.S. Supreme Court held in *Chaidez v. U.S.*, 133 S.Ct. 1103 (2013), that it is not retroactive under federal law. It is also the first time the SJC has accepted the invitation by the Supreme Court in *Danforth v. Minnesota*, 552 U.S. 264 (2008), to diverge from strict reliance on federal retroactivity law and fashion its own retroactivity formulation under state law when considering the application of federal constitutional rights. This advisory discusses the *Sylvain* decision and its implications both for noncitizen defendants seeking to vacate convictions that unwittingly result in severe immigration consequences and for other defendants who are seeking the application of recent federal constitutional rulings.

II. Retroactivity of *Padilla* prior to the *Sylvain* decision

Padilla was decided by the U.S. Supreme Court on March 31, 2010. Although the decision did not directly address its retroactivity, some courts and constitutional scholars believed that the language of the decision implied that the Supreme Court intended it to apply to convictions obtained prior to 2010. Before the Supreme Court had the opportunity to rule specifically on the issue of *Padilla*'s retroactivity, however, the SJC, in *Commonwealth v. Clarke*, 460 Mass. 30

(2011), held that *Padilla* was retroactive under federal law to convictions that became final after April 1, 1997.¹

In *Clarke*, the SJC followed Supreme Court jurisprudence on retroactivity as originally outlined in *Teague v. Lane*, 489 U.S. 288 (1989) and adopted by the SJC in *Commonwealth v. Bray*, 407 Mass. 296, 300-301 (1990). Under *Teague* and *Bray*, a “new rule” may not be applied retroactively to review of final convictions, unless it falls into one of two exceptions (not considered applicable to *Padilla*). A case announces a new rule under *Teague* “when it breaks new ground or imposes a new obligation” on the government. By contrast, a case does not announce a new rule when it is “merely an application” of a prior decision to a different set of facts. The *Clarke* decision held that *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).

In February 2013, however, the Supreme Court held in *Chaidez* that *Padilla* was not retroactive under *Teague*, thereby abrogating the SJC’s decision in *Clarke* and calling into question the availability of postconviction motions based on *Padilla* for convictions obtained between 1997 and 2010.

III. The Sylvain decision

Kempess Sylvain is a long-term lawful permanent resident (“green card” holder) from Haiti who pled guilty in 2007 to possession of cocaine. He was originally charged with possession with intent to distribute cocaine after police allegedly saw him and a woman pulling up their pants in an area known for prostitution. Police then saw the defendant put a few small baggies of what they believed to be cocaine in his mouth and, subsequent to a questionable stop, found one small baggie of cocaine in his pocket. The defendant agreed to plead guilty to simple possession and be sentenced to eleven months in the house of correction suspended for two years after his defense attorney told him that this disposition was not likely to result in deportation because it was straight possession with a sentence of less than one year. Upon discovering that this advice was erroneous and that immigration officials planned to initiate removal proceedings against him², the defendant filed a motion for new trial based on ineffective assistance of counsel under *Padilla*. The trial judge denied the motion and the defendant filed an appeal in the Appeals

¹ 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, resulting in virtually certain removal for convictions of offenses contained in the greatly expanded category of “aggravated felonies,” and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) went into effect on April 1, 1997]. A petition for rehearing filed by the defendant requesting that *Padilla* be retroactive to April 24, 1996 was denied.

² Pursuant to 8 U.S.C. §1227 (a)(2)(B)(i), a noncitizen is deportable upon conviction for any law “relating to a controlled substance,” other than a single conviction for thirty grams or less of marijuana.

Court. While his appeal was pending, the Supreme Court issued its decision in *Chaidez* and the defendant filed for direct appellate review which was granted by the SJC.

A. Retroactivity of the Sixth Amendment right under *Padilla*

The SJC began its discussion of retroactivity in *Sylvain* by reviewing its analysis in *Clarke*, in which it relied on the *Teague* framework. “Under *Teague* and its progeny, although ‘new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced,’ ... ‘old rule[s] appl[y] both on direct and collateral review.’” A postconviction motion to vacate a plea or motion for new trial under Mass. R. Crim. P. 30 (Rule 30) is considered “collateral review” of a conviction. A Rule 30 motion, therefore, cannot rely on case law decided after the conviction has become final, unless such case law does not announce a “new rule.” What constitutes a “new rule” is thus crucial to retroactivity analysis.

Under *Teague*’s original formulation, 489 U.S. at 301, “a case announces a new rule if the result was not dictated by precedent” at the time the defendant’s conviction became final. According to the SJC, the Supreme Court has since significantly expanded the definition of a new rule to include decisions not “apparent to all reasonable jurists” at the time the conviction became final. Based on the Supreme Court’s permission in *Danforth* for state courts to adopt their own retroactivity rules thereby allowing for greater collateral review of state convictions³, the SJC held that it will continue to follow only *Teague*’s original formulation as adopted in *Bray*, thus finding a “new rule” only if the result is contrary to precedent.

Using the original *Teague* retroactivity framework, the SJC considered its reasoning in *Clarke* and that of Justice Sotomayor in her dissent in *Chaidez*, along with the lack of Massachusetts precedent contrary to *Padilla*. It also discussed the evolution over the last fifteen years of Massachusetts professional standards requiring defense attorneys to advise noncitizen clients of immigration consequences. This analysis led the Court to hold that *Padilla* was not contrary to Massachusetts precedent and not a “new rule.” The Court therefore upheld its ruling in *Clarke* and found that *Padilla* is retroactive to convictions obtained after April 1, 1997.

B. Article 12 right to accurate advice about immigration consequences

While *Padilla* enunciated a right to accurate advice about immigration consequences as part of the Sixth Amendment right to effective assistance of counsel, the SJC had not previously ruled on whether a similar right existed under art. 12 of the Massachusetts Declaration of Rights. The SJC ruled in *Commonwealth v. Marinho*, 464 Mass. 115 (2013), that defense counsel must advise noncitizens of immigration consequences prior to plea or trial and must advocate for a disposition that minimizes immigration consequences when possible, but the Court had not specified the basis of such right. In *Sylvain*, the Court stated unequivocally, “[w]e take the opportunity today to clarify that under art. 12 defense counsel must accurately advise a

³ The SJC found it unnecessary to consider whether it should adopt its own retroactivity formulation in *Clarke*, since it found *Padilla* to be retroactive under federal law. *Clarke*, 460 Mass. at 35 n.7.

noncitizen client of the deportation consequences of a guilty plea or a conviction at trial.” The Court further held that the right under art. 12 is retroactive for the same reasons it had found the Sixth Amendment right to be retroactive. In addition, the Court stated that “tenets of fundamental fairness require that this right apply retroactively.” (citing *Commonwealth v. Amirault*, 424 Mass. 618, 639 (1997)).

C. Ineffective assistance of counsel

The defendant’s motion to vacate his conviction included an affidavit by trial counsel stating that he told the defendant that if the defendant was convicted of simple possession of cocaine and received a sentence of less than one year, this disposition would not likely result in his deportation. The SJC found this advice to be “plainly incorrect” and sufficient to establish deficient performance of trial counsel in satisfaction of the first prong of an ineffective assistance of counsel claim under *Strickland* and *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974).⁴ Although the SJC found the defendant’s affidavit to be “highly suggestive that he would have elected to go to trial but for his attorney’s erroneous advice,” the Court remanded the for the motion judge to make findings on whether the defendant was sufficiently prejudiced by such erroneous advice as to satisfy the second prong of *Strickland* and *Saferian*.

IV. Impact of *Sylvain* for noncitizen defendants

Sylvain allows noncitizen defendants to continue to challenge Massachusetts convictions obtained after April 1, 1997 based on ineffective assistance of counsel under *Padilla*. While the SJC’s two prior decisions concerning *Padilla*, *Clarke* and *Marinho*, provide guidance on the contours of *Padilla* claims, i.e., what constitutes deficient performance under the first prong of *Strickland* and *Saferian* and ways for a defendant to establish prejudice under the second prong, *Sylvain* does not expound upon this case law. By creating a separate right under art. 12, however, the SJC leaves open the possibility that it will develop a broader right in future cases under the Massachusetts Declaration of Rights than the one created by *Padilla* under the Sixth Amendment.

V. Impact of *Sylvain* on retroactivity of new constitutional rulings

From 1990, when the Court adopted *Teague* in *Bray*, until the decision in *Sylvain*, the SJC has followed the Supreme Court’s interpretation of what constitutes a “new rule” for retroactivity purposes. In *Sylvain*, the SJC held that it will define what constitutes a new rule more narrowly than under Supreme Court jurisprudence, “thereby expand[ing] the availability of remedies for violations of Federal constitutional rights.” This may impact at least two cases now pending in the SJC regarding the retroactive application of new constitutional rulings; *Diatchenko v. D.A. for the Suffolk District*, SJC-11453 (mandatory juvenile life without parole) and *Commonwealth v. Alebord*, SJC-11354 (public trial right during jury selection). If so, the SJC may continue to be in the forefront of providing more expansive constitutional rights to defendants under state law than under federal law.

⁴ See *supra*, n.2.