



The Commonwealth of Massachusetts

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A Practice Advisory on *Commonwealth v. Marinho* February 4, 2013

I. Introduction

On January 14, 2013, the Massachusetts Supreme Judicial Court decided *Commonwealth v. Marinho*, SJC-11058, 2013 Mass. LEXIS 9 (Jan. 14, 2013), further elaborating upon the U.S. Supreme Court decision in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010). In *Padilla*, the U.S. Supreme Court held that defense counsel has a Sixth Amendment duty to advise noncitizen clients of potential immigration consequences prior to pleading guilty. In *Marinho*, the SJC found that this duty includes advising noncitizen clients prior to trial and further extends to advocating at sentencing for dispositions that minimize immigration consequences. The decision also addresses how prejudice can be established in these situations. This advisory discusses the *Marinho* decision and its implications for post-conviction claims of ineffective assistance of counsel.

II. The *Marinho* Decision

Unlike *Padilla* and the earlier SJC decision, *Commonwealth v. Clarke*, 460 Mass. 30 (2011), the *Marinho* decision arises from a motion for new trial after a jury trial and not a motion to vacate a guilty plea.

The defendant, Alessandro Marinho, was born in Brazil and came to the U.S. without documents when he was 11 years old. In 2009, he was charged with Assault and Battery with a Dangerous Weapon (ABDW) and Aggravated Assault and Battery (Agg. A&B). In 2010, the defendant was convicted after a jury trial of Agg. A&B and acquitted of ABDW. He was sentenced to 2.5 years in the House of Correction, nine months to serve with the balance suspended. Because the sentence was more than one year (a "sentence" under immigration law includes both imposed and suspended sentences of imprisonment), this conviction constituted an aggravated felony, the most serious category of offenses for immigration purposes, which result in nearly automatic deportation and permanent exclusion from the U.S.

After his conviction, the defendant filed a motion for new trial alleging ineffective assistance of counsel under *Padilla* and *Clarke* due to his trial counsel's failure (1) to advise him of the immigration consequences of a conviction, (2) to explore a more favorable plea resolution, and (3) to advocate after trial for a sentence that would have mitigated the immigration consequences. After the motion was denied and the case appealed, the SJC transferred the case *sua sponte* from the Appeals Court. Prior to the appeal, the defendant was removed from the U.S.

The standard for ineffective assistance of counsel was set forth by the U.S. 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" (deficient performance), and 2) that such deficient representation "likely deprived the defendant of an otherwise available, substantial ground of defence" (prejudice).

a. Deficient Performance

In *Padilla*, the U.S. Supreme Court held that defense counsel must inform a defendant of the immigration consequences stemming from a guilty plea. Relying on the language in *Padilla*, the Court in *Marinho* looked to national and local standards, including the CPCS Assigned Counsel Manual¹, and held that defense counsel is equally obligated to "inform a noncitizen client that conviction at trial may similarly carry immigration consequences." *Marinho*, 2013 Mass. LEXIS 9, at *19. Thus, because defense counsel in this case failed to provide the defendant with advice about the immigration consequences of a conviction after trial, his performance fell "measurably below that which might be expected from an ordinary fallible lawyer." *Id.* at *21 (quoting *Commonwealth v. Saferian*, 366 Mass. 89 (1974)).

Furthermore, the Court found that although *Padilla* is not directly applicable outside the defense counsel's duty to advise about the potential immigration consequences of a conviction, such consequences should necessarily factor into litigation strategy, including at the plea and sentencing stages of a case. Thus, counsel's failure to inform the defendant that the prosecutor offered to discuss a plea, "deprived [defendant] of the opportunity to make an intelligent decision, based on greater information, about whether to proceed to trial or to request that counsel engage in plea negotiations." *Id.* at *26. Moreover, counsel's failure to argue at sentencing for a shorter sentence, one that would have avoided an aggravated felony conviction, was deficient performance.²

Based on these failures, the Court concluded that the trial attorney's performance in this case was deficient.

¹ Although not bound by CPCS standards, the Court stated in a footnote that it finds them "persuasive."

² The Court made clear that "[i]n the aftermath of *Padilla*, earlier characterizations of immigration consequences as 'collateral' are no longer good law." *Marinho*, 2013 Mass. LEXIS 9, at * FN 14. In so ruling, the court explicitly stated that *Commonwealth v. Quispe*, 433 Mass. 508 (2001) is no longer good law. *Id.* at * FN 19.

b. Prejudice

Having satisfied the first prong of *Sefarian*, the defendant then must show that, but for counsel's deficient performance, he would have done something differently. In *Clarke*, the SJC found that a defendant may show prejudice in any one of three ways:

1. The defendant had an available, substantial ground of defense;
2. There is a reasonable probability that a different plea bargain could have been negotiated;
3. "Special circumstances" existed that caused the defendant to place particular emphasis on immigration consequences, such that he would have risked going to trial even if there was a strong likelihood that he would be found guilty.

In *Marinho*, the first and third methods are inapplicable as they entail showing the defendant would have gone to trial instead of accepting a plea. The Court considered the second method and stated that the defendant must show "a reasonable probability that the result of the plea would have been more favorable than the outcome of the trial." *Marinho*, 2013 Mass. LEXIS 9, at *29. The Court suggested that a defendant can demonstrate this by showing "a reasonable probability that the prosecution would have made an offer, that the defendant would have accepted it, and that the court would have approved it." *Id.* In this case, the Court found that the defendant had offered no evidence to establish a reasonable probability that a more favorable plea could have been negotiated.

In finding that the defendant had not established prejudice, the Court relied on the fact that Mr. Marinho was undocumented and had not presented a reasonable plea that would have allowed him to remain in the U.S. or apply for relief from removal. *Id.* at *33 ("The defendant provided no proof that his counsel's conduct as opposed to his undocumented status led to his deportation.")³ The Court focused on whether there was any plea that would have allowed the defendant to avoid removal, not on whether he could have avoided an aggravated felony conviction.⁴ The Court's analysis presumes that, had the defendant been a legal permanent resident or held other legal status, his trial counsel could have reasonably advocated for a plea that might have been acceptable to the prosecutor and the court, and the failure to do so would have established prejudice.

III. The Dissent

Concurring in part and dissenting in part, Justice Duffly agreed with the majority that the defendant had established deficient performance of trial counsel. However, she dissented from the majority's prejudice analysis. Duffly suggested that prejudice should be established if the defendant can demonstrate that, but for counsel's deficient performance, he would have sought a plea that minimized the risk of potential consequences of deportation. Contrary to the majority, she does not believe that the defendant also must show that there was a reasonable probability that a specific plea would have been offered or accepted by

³ The Court was careful to note that it would not be impossible for an undocumented defendant to successfully litigate an ineffective assistance of counsel claim, but that the defendant in this instance did not provide that information. *Id.* at *FN 21.

⁴ In FN 27, the Court indicated that it is unclear about whether the aggravated felony conviction was a permanent bar to admission and suggested that, had the defendant provided information regarding this issue, it may have provided sufficient proof of prejudice. Note that under 8 U.S.C. § 1182(a)(9)(A), any noncitizen deported for an aggravated felony is permanently barred from admission.

the prosecutor. Duffly distinguished this case from the U.S. Supreme Court cases of *Lafler v. Cooper*, 132 S.Ct. 1376 (2012) and *Missouri v. Frye*, 132 S. Ct 1399 (2012) in which specific plea offers were made. She implied in her dissent that, because of the deficient performance, the defendant had no plea offer to present to the court as proof that a better offer could have been reached.

Justice Duffly further asserted that, even accepting the majority's prejudice requirements, the defendant had met the standard. "[T]he defendant's immigration status as an undocumented alien does not mean that he suffered no prejudice by being subject to removal for having committed an aggravated felony." *Marinho*, 2013 Mass. LEXIS 9, at *55. She suggested that simply showing the consequences of an aggravated felony should be enough to establish prejudice.

IV. Conclusion

Marinho holds that the right to advice about immigration consequences applies to cases that go to trial and to sentencing advocacy. It firmly establishes that immigration consequences are not collateral, thereby abrogating prior Massachusetts case law to the contrary. The majority opinion also clarifies that prejudice can only be established in a *Padilla* motion if the defendant shows specifically how advice or advocacy at sentencing would have likely resulted in less severe immigration consequences.

In order to succeed on a *Padilla* motion, the record must include detailed information about how, with proper knowledge and advice regarding immigration consequences, there was a reasonable probability that a safer plea could have been negotiated. A "reasonable probability" does not require proof beyond a reasonable doubt or even clear and convincing evidence. While the Court cited to *Lafler* and *Frye* as examples, in those cases specific plea offers had been made and could be used as evidence. As this is not the situation in the majority of cases, counsel should not be required to provide the same. Post-conviction counsel should include relevant immigration statutory and case law citations, along with policy memos discussing immigration enforcement priorities, in order to establish how a different disposition would have minimized the immigration consequences to the defendant.