



# The Commonwealth of Massachusetts

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## **Practice Advisory on reliance of affidavits in postconviction motions:** ***Commonwealth v. Sylvain*, 473 Mass. 832 (2016)**

### **I. Introduction**

On March 14, 2016, the Supreme Judicial Court (SJC) held in *Commonwealth v. Sylvain*, 473 Mass. 832 (2016) (*Sylvain II*), that the trial judge did not abuse his discretion when he relied predominantly on affidavits of the defendant and trial counsel in allowing a motion to vacate a conviction due to ineffective assistance of counsel for failure to provide accurate advice regarding immigration consequences of the plea. This decision provides helpful guidance not only for postconviction counsel pursuing motions based on ineffective assistance of counsel but for other postconviction motions as well.

### **II. Background of the case**

The SJC held in *Commonwealth v. Sylvain*, 466 Mass. 422 (2013) (*Sylvain I*), that the Sixth Amendment right to complete and accurate advice regarding immigration consequences established in *Padilla v. Kentucky*, 559 U.S. 356 (2010), is retroactive under art. 12 of the Massachusetts Declaration of Rights, and that a similar right exists under art. 12 which is also retroactive. For a more detailed discussion of the decision, see the CPCS Immigration Impact Unit practice advisory [here](#).

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 was 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

him<sup>1</sup>, the defendant filed a motion for new trial based on ineffective assistance of counsel under *Padilla*.

As with any claim of ineffective assistance of counsel, a defendant must show not only deficient performance by the trial attorney but also prejudice such that there is a reasonable probability that with accurate advice the outcome of the case would have been different. The SJC articulated how a defendant can establish prejudice in *Commonwealth v. Clarke*, 460 Mass. 30 (2011), by either showing that 1) he had an available, substantial defense to the charges, 2) a reasonable probability existed that a plea with lesser immigration consequences could have been negotiated, or 3) “special circumstances” existed such that avoiding immigration consequences was so important to the defendant that he would have “rolled the dice” and gone to trial even if the odds of winning were against him.

In *Sylvain I*, after holding that the right to accurate advice regarding immigration consequences existed at the time of Mr. Sylvain’s plea in 2007, the SJC found that his trial attorney’s misadvice concerning immigration consequences constituted deficient performance. The Court then opined that although the defendant’s affidavit in support to the motion was “highly suggestive” of prejudice the Court could not make such a ruling without additional findings by the motion judge. The SJC remanded the case to the trial court “with instructions to provide findings relating to the issue of prejudice and if necessary, to hold an additional evidentiary hearing.” *Sylvain I*, 466 Mass. at 439.

### **III. The *Sylvain II* decision**

Upon remand, the motion judge (who was also the original plea judge) held a hearing during which affidavits of the defendant and trial counsel were submitted and the defendant’s girlfriend testified. Neither the defendant nor plea counsel were present (the defendant was in immigration custody and counsel waived his presence). Relying primarily on the affidavits of the defendant and trial counsel, the judge found the affidavits credible, supportive of one another, and sufficient to establish “special circumstances,” in that the defendant had “placed particular emphasis on the immigration consequences” to constitute prejudice, thereby allowing the motion to vacate his plea.

The Commonwealth submitted no conflicting affidavits or evidence of its own, but it objected to the allowance of the motion and filed a motion to reconsider arguing that the judge improperly relied upon the affidavits in allowance of the motion. The judge offered to conduct a further evidentiary hearing, and specifically to allow the Commonwealth to cross-examine plea counsel, but it refused, asserting that it was not its burden to call witnesses. The judge denied the motion to reconsider and the Commonwealth appealed. Upon request of the defendant, the SJC heard the case on direct appellate review.

The SJC found that the motion judge had not abused his discretion in allowing the motion to vacate based primarily upon affidavits of the defendant and plea counsel. The Court noted that

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<sup>1</sup> 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.

Mass. R. Crim. P. 30 (c)(3) explicitly states that a “judge may rule on the issue or issues presented by a [postconviction] motion on the basis of facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits.” Such rule further states that “parties opposing a motion may file and serve affidavits where appropriate in support of their respective positions.” The Commonwealth chose not to call any witnesses or submit affidavits with conflicting evidence. The Court stated in a footnote that the judge” took the appropriate course of action by providing the Commonwealth with the opportunity to challenge the factual assertions contained in the affidavits. The Commonwealth, however, chose not to do so, and thus waived any argument on this ground.”

Both the affidavits of the defendant and plea counsel submitted in support of the motion asserted that the defendant had been erroneously advised that if he received a sentence of less than one year on the possession charge, he would not be deported. The sentence imposed, eleven months suspended for two years, lent further support to the argument that minimizing immigration consequences was an issue during the plea. As the affidavits contained a sufficient factual basis to establish prejudice and such facts were undisputed, it was not error for the judge to allow the motion to vacate based primarily on the affidavits. The Court therefore affirmed the allowance of the motion.

#### **IV. Impact of *Sylvain II* on postconviction motions**

*Sylvain II* permits judges to allow postconviction motions based solely on affidavits. Prior to this decision, the Appeals Court in *Commonwealth v. Gordon*, 82 Mass. App. Ct. 389 (2012), and the SJC in *Commonwealth v. Muniur M.*, 467 Mass. 1010 (2014), had suggested otherwise and prior caselaw had only interpreted Rule 30 (c)(3) to allow for denial of motions based on affidavits. While the presentation of live testimony in a Rule 30 motion remains preferable in order to create a stronger, more complete record that may better sustain appellate review, if the defendant is unavailable due to incarceration, deportation or for strategic reasons, or trial counsel is unavailable for any reason, postconviction counsel may rely only on affidavits submitted in support of the motion. It is obviously preferable if the affidavits contain strong evidence that the defendant was not properly advised, and if corroborating evidence is also submitted. For example, a requested disposition by plea counsel of a “continued without a finding for eleven months” is a prime example of a disposition that mistakenly tries to minimize immigration consequences, because less than one year is only helpful for sentences of incarceration on certain categories of offenses which become aggravated felonies with sentences of one year or more, while a term of probation of less than one year neither prevents an aggravated felony or a conviction for immigration purposes.

In cases in which the Commonwealth does not submit conflicting evidence or make a showing of facts in dispute, *Sylvain II* provides strong authority that the Commonwealth cannot request an evidentiary hearing merely as a fishing expedition on cross-examination without any showing of a factual issue. Although the Court stated in dicta that it was appropriate to allow the Commonwealth an opportunity to “challenge the factual assertions contained in the affidavits,” mere opposition to the motion is insufficient to require an evidentiary hearing, as Rule 30(c)(3) allows for disposition of a motion without an evidentiary hearing if no factual dispute exists.

Counsel should therefore submit affidavits which address all grounds in the motion, along with any corroborating evidence that enhances the credibility of the affidavits. If the Commonwealth doesn't submit conflicting evidence or affidavits and doesn't choose to call any witnesses, it cannot request an evidentiary hearing merely as a fishing expedition in hopes of eliciting damaging testimony for the witnesses. In such a situation, the judge may allow the motion without an evidentiary hearing.