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Practice Advisory on the Impact in Massachusetts **of *Chaidez v. United States*** **March 8, 2013**

I. Introduction

On February 20, 2013, the U.S. Supreme Court held in *Chaidez v. United States*, 568 U.S. ___, 2013 U.S. LEXIS 1613 (Feb. 20, 2013) that federal courts may not apply *Padilla* retroactively to convictions that became final before the date *Padilla* was issued – March 31, 2010. In 2010, the Supreme Court held in *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), that defense counsel have a Sixth Amendment duty to advise noncitizen clients of potential immigration consequences prior to pleading guilty. In *Chaidez*, the Supreme Court concluded that *Padilla* announced a “new rule” under *Teague v. Lane*, 489 U.S. 288 (1989), such that federal courts may not apply the *Padilla* holding to convictions that were final when *Padilla* was decided.

It remains unclear how this ruling will impact post-conviction *Padilla* motions in Massachusetts state courts. In *Commonwealth v. Clarke*, 460 Mass. 39 (2011), the Supreme Judicial Court (SJC) applied the *Teague* analysis and concluded that *Padilla* was not a new rule and therefore should be applied retroactively to convictions that became final after April 1, 1997. The SJC expressly declined in *Clarke* to consider whether to abandon the *Teague* analysis and adopt a broader application of new constitutional rules, as permitted under *Danforth v. Minnesota*, 552 U.S. 264 (2008).

II. Background to *Chaidez*: *Teague* Retroactivity Analysis

The Supreme Court, relying on its authority to create and interpret federal habeas law, has created federal common law that limits post-conviction challenges brought in federal court. Habeas and *coram nobis* are mechanisms to challenge final convictions (those convictions whose direct appeals have been exhausted) in federal court. As part of their authority to interpret the federal habeas statute, the Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989) announced the framework for determining whether a new decision could be applied on habeas review. Under *Teague*, a “new rule” may not be applied retroactively to review of

final convictions.¹ 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 *Teague* framework, however, need not be applied by State courts. In *Danforth v. Minnesota*, 552 U.S. 264 (2008), the Supreme Court held that its own retroactivity analysis in *Teague* has “no bearing on whether States can provide broader relief in their own post-conviction proceedings.” 552 U.S. at 277. The Court stated that “*Teague* . . . does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed ‘nonretroactive’ under federal rules.” *Id.* at 282.

III. The *Chaidez* Decision

In 1997, Roselva Chaidez, a lawful permanent resident since 1977, pleaded guilty in Federal District Court to two counts of mail fraud, with loss amounting to \$26,000. The conviction became final in 2004. This conviction constituted an aggravated felony under immigration law, such that she was subject to nearly automatic deportation and permanent exile. 8 U.S.C. § 1101(a)(43)(M)(i).

In 2009, after immigration officials initiated removal proceedings, Ms. Chaidez sought to overturn her conviction through a petition for a writ of *coram nobis* in Federal District Court, arguing that her defense attorney had failed to advise her of the immigration consequences of her conviction, thereby depriving her of effective assistance of counsel under the Sixth Amendment. The District Court vacated her conviction, concluding that Ms. Chaidez had been deprived of her Sixth Amendment right and further that the Supreme Court’s decision in *Padilla* should be applied to the case, even though Ms. Chaidez’ conviction had become final before that decision had issued. In so holding, the District Court concluded that *Padilla* did not announce a “new rule” under *Teague*. On appeal, the U.S. Court of Appeals for the Seventh Circuit reversed, concluding that the decision in *Padilla* was a “new rule” that should not be applied retroactively to Ms. Chaidez’ conviction, which became final before March 31, 2010. The Supreme Court granted certiorari “to resolve a split among federal and state courts on whether *Padilla* applies retroactively.”

The Supreme Court concluded that *Padilla* had, in fact, announced a “new rule” under the *Teague* analysis, rejecting the argument that *Padilla* was a mere application of *Strickland v. Washington*, 466 U.S. 668 (1984) to new facts. The *Strickland* opinion lays out the framework for analyzing ineffective assistance of counsel under the Sixth Amendment and generally the extension of *Strickland* to new contexts is not considered a “new rule” under *Teague*. However, the Supreme Court concluded that before applying the familiar *Strickland* analysis, the *Padilla* court responded to a new threshold question: “Was advice about deportation ‘categorically removed’ from the scope of the Sixth Amendment right to counsel

¹ *Teague* created two exceptions to this principle for “watershed rules of criminal procedure” and rules that place “conduct beyond the power of the [government] to proscribe.” No party argued that either of these exceptions might apply in *Chaidez* and the Supreme Court did not address them.

because it involved only a ‘collateral consequence’ of a conviction, rather than a component of the criminal sentence?” The answer to this question – yes – broke new ground, according to the *Chaidez* court, in large part because the vast majority of inferior courts that considered this question had determined that the Sixth Amendment did not extend to advice about immigration consequences. The Court distinguished lower court decisions prior to *Padilla* that found misstatements about deportation could support an ineffective assistance claim, concluding that while a minority of courts had recognized a separate rule for material misrepresentations, that rule did not apply in *Chaidez*’ case.

Writing in dissent, Justice Sotomayor, joined by Justice Ginsburg, argued that *Padilla* was “built squarely on the foundation laid out by *Strickland*” and that the distinction noted by the majority with respect to collateral and direct consequences did not exist in Supreme Court effective assistance of counsel precedent.

IV. Impact of *Chaidez* in Massachusetts: Does *Padilla* Still Apply Retroactively in Massachusetts?

In *Commonwealth v. Clarke*, 460 Mass. 39 (2011), the SJC applied the *Teague* framework and came to the opposite conclusion. The decision in *Padilla*, according to the SJC, did not create a new rule, but was simply an extension of the *Strickland* framework. The SJC relied heavily on the evolution of professional standards, both nationally and in Massachusetts, which required advice regarding immigration consequences. In a footnote, the SJC acknowledged that it was free to reject the *Teague* framework, but declined to consider the issue because it concluded *Padilla* was retroactive even under *Teague*. 460 Mass. at 34 n.7. This leaves open the question of whether *Padilla* applies to convictions that became final after April 1, 1997 and before March 31, 2010.

There are strong arguments to support the position that the SJC may continue to apply *Padilla* retroactively in Massachusetts state courts, despite the *Chaidez* opinion. The following arguments were raised in a recently filed application for direct appellate review (DAR) in *Commonwealth v. Kempess Sylvain*, DAR-21463.

- Because the SJC is not required to apply the *Teague* analysis to determine when a new rule is announced, it may use the *Teague* framework but reach a divergent conclusion from *Chaidez*, and should thus continue to find *Padilla* retroactive.
- Principles of fundamental fairness, arising from the broad protections of article 12, require the retroactive application of the *Padilla* holding.
- Because relief under *Padilla* may only be sought by defendants pursuant to Rule 30 motions, such claims for relief should be treated as direct review, thus even a new rule must be applied retroactively.
- *Chaidez* did not erode the retroactive application of a defendant’s Sixth Amendment right not to be affirmatively misadvised regarding the immigration consequences of his conviction.

On March 7, 2013, the SJC allowed the DAR application in *Sylvain*, SJC-11400. Oral argument is scheduled for the first week of May 2013. A copy of the DAR application is attached to this advisory.

V. Pending or new *Padilla* motions on convictions that became final after April 1, 1997 and before March 31, 2010

Whether *Padilla* continues to be applied retroactively in Massachusetts to convictions that became final after April 1, 1997 and before March 31, 2010 will be decided by the SJC in *Sylvain*. Until issuance of a decision in that case, however, counsel must consider how to proceed with both cases pending in the trial courts and Massachusetts Appeals Court and with clients who wish to file *Padilla* motions now.

For pending post-conviction motions or appeals:

- If the client has time (i.e. if the client is not yet in removal proceedings or not likely to be ordered deported in the near future), counsel should request a stay until the SJC issues a decision in *Sylvain*.
- If the client does not have time (i.e. if the client is likely to be deported soon), counsel should proceed with the post-conviction motion and request leave to file supplemental briefing on the issue of retroactivity (see the attached DAR application for sample arguments). In addition to arguing that *Padilla* may still be applied retroactively in the Commonwealth, counsel should carefully review the case to see if there are other grounds, independent of *Padilla*, to challenge the conviction. Counsel should review *Commonwealth v. Villalobos*, 437 Mass. 797 (2002) to determine if there is a viable challenge to the voluntariness of your client's plea. Defense counsel may contact the IIU for assistance in crafting such arguments.

For cases in which *Padilla* motions have not yet been filed:

- If the client has time, counsel should wait to file the *Padilla* motion until the SJC issues a decision in *Sylvain*.
- If the client does not have time, see the note above.

VI. Conclusion

While *Chaidez* has created some uncertainty in Massachusetts regarding the retroactivity of *Padilla*, it is important to remember that *Padilla* itself remains good law and must be applied to all convictions pending on direct appeal or imposed in the trial courts on or after March 31, 2010. For those convictions that became final before March 31, 2010, there remain strong arguments for the retroactive application of *Padilla*. However, defense counsel should carefully review all cases potentially impacted by *Chaidez* to determine if there are additional grounds for challenging those convictions independent of *Padilla*.

STAFF COUNSEL

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

DAR 21463

Suffolk, ss.

No.

Appeals Ct. No. 2012-P-0749

Commonwealth of Massachusetts
Appellee

v.

Kempess Sylvain
Defendant-Appellant

On Appeal from a Final Judgment Entered in the
Dorchester Division of the Boston Municipal Court

Application for Direct Appellate Review for the
Defendant-Appellant Kempess Sylvain

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March 4, 2013

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

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March 4, 2013

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- Edgar J. McManus, *Law and Liberty in Early New England: Criminal Justice and Due Process, 1620-1692* (1993)... .14
- Morris L. Ernst & Alan O. Schwartz, *The Right to Counsel and the "Unpopular Cause"*, 20 U. Pitt. L. Rev. 727, 728 (1959)... .15
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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT NO.
APPEALS COURT NO. 2012-P-0749

COMMONWEALTH

v.

KEMPES SYLVAIN

APPLICATION FOR DIRECT APPELLATE REVIEW

Now comes the defendant in the above-entitled case and moves this Honorable Court, pursuant to Mass. R. App. P. 11, for direct appellate review of his appeal. The grounds for this application are set forth in the accompanying memorandum.

The defendant also files on this date a Motion to Allow Late Filing of Application for Direct Appellate review in light of recent United Supreme Court jurisprudence in the case of Chaidez v. United States, 586 U.S. ___, 2013 U.S. LEXIS 1613 (February 20, 2013).

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Dated: March 4, 2013

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
APPEALS COURT NO. 2012-P-0749

COMMONWEALTH

v.

KEMPES SYLVAIN

**MEMORANDUM IN SUPPORT OF APPLICATION FOR
DIRECT APPELLATE REVIEW**

The defendant's Application for Direct Appellate Review presents the pressing issue of whether the rule set forth in Padilla v. Kentucky, 130 S. Ct. 1473 (2010), and as interpreted by this Court in Commonwealth v. Clarke, 460 Mass. 30 (2011), should continue to be applied retroactively in Massachusetts to convictions finalized prior to March 31, 2010. In light of the United States Supreme Court's recent decision in Chaidez v. United States, 586 U.S. ___, 2013 U.S. LEXIS 1613 (February 20, 2013), this Court should resolve the issue expeditiously to provide guidance to non-citizen defendants with otherwise viable claims, as well as inferior courts within its jurisdiction.

Accordingly, Mr. Sylvain respectfully seeks direct appellate review of his claims by this Court, for the reasons set forth below.

STATEMENT OF PRIOR PROCEEDINGS

On April 17, 2007, the defendant was charged with possession with intent to distribute a Class B substance in violation of G.L. c. 94C §32A and a drug violation near a school or park in violation of G.L. c. 94C §32J. (R.A.5)¹. On October 2, 2007, the defendant pled guilty to possession of a Class B substance and was sentenced to eleven months suspended for two years. (Coffey, J.). (R.A.29).

On January 12, 2012, represented by new counsel, the defendant filed a Motion to Vacate Plea on the grounds that his attorney provided him with ineffective assistance of counsel when he gave him affirmative misadvice regarding the immigration

¹ The defendant cites to the Record Appendix as "(R.A.pg.)", which was filed with his brief in the Appeals Court and is also included in this Application for ease of reference. The Addendum is cited as "(Add.)". The defendant's brief in the Appeals Court is cited as "(D.Br. at pg.)"; the transcript of the hearing for the Motion to Vacate Plea is cited as "(Tr.pg.)". In accordance with Mass. R. Crim. P. 11(b), appended hereto is the complete docket (R.A.2-4) and the handwritten rulings of J. Coffey (R.A.48-48(a), 70-70(a)).

consequences of a guilty plea to possession of a Class B controlled substance.

On February 22, 2012, a hearing on the Motion to Vacate Plea was held. (R.A.3). The Commonwealth filed a written opposition on the day of the hearing. (R.A.33). The district court (Coffey, J.) took the matter under advisement and later denied the Motion to Vacate on the same day in an order without written findings. (R.A.48). On March 13, 2012, the defendant filed a Motion to Reconsider, (R.A.56), which was also denied without written findings (R.A.70).

The defendant appealed the denials of his Motion to Vacate Plea and Motion to Reconsider on March 23, 2012, and the case was docketed in the Appeals Court on May 4, 2012. The defendant filed his brief in the Appeals Court on May 22, 2012; the Commonwealth filed its brief on August 3, 2012; and the defendant filed a reply brief on August 28, 2012. On January 11, 2013, the case was assigned to a panel (Berry, Kafker, Katzmann, JJ.).

On February 20, 2013, the United States Supreme Court decided the case of Chaidez v. United States, 586 U.S. ___, 2013 U.S. LEXIS 1613 (February 20, 2013), where it held that a defendant is not entitled to

retroactive application of Padilla as a matter of federal law. This Court had previously found that Padilla should be applied retroactively under federal law, but left open the question of whether Padilla would also be applied retroactively under state law. Commonwealth v. Clarke, 460 Mass. 30, 35 n. 7 (2011).

Because this appeal raises (1) a question of first impression or a novel question of law which should be submitted for final determination to this Court; (2) a question of law concerning the Constitution of the Commonwealth, and (3) a question of such public interest that justice requires a final determination by the full Court, Mass. R. App. P. 11(a), Mr. Sylvain hereby seeks direct appellate review.

SHORT STATEMENT OF FACTS RELEVANT TO THE APPEAL

At the time of his guilty plea to possession of a class B substance, Mr. Sylvain, a lawful permanent resident of the United States and a national of Haiti, (R.A.24), had resided in this country for eleven years, since he came here with his family when he was seventeen years old. (R.A.24). His young son, long-time partner, parents and siblings, all United States citizens or permanent residents, lived in the same

community, and Mr. Sylvain had a solid work history (R.A.24-25).

Immediately prior to pleading guilty, Mr. Sylvain had expressed to his attorney particular hesitation to plead guilty to anything that would result in immigration consequences, because he had previously been in removal proceedings and was particularly wary. (R.A.25). Trial counsel, who was aware of his client's specific immigration concerns (R.A.8), advised his client that it was his understanding that simple possession of a class B substance was not a deportable offense, and that even if it were, negotiating a sentence of eleven months would avoid any immigration consequences. (R.A.25, 27). Trial counsel advised his client that a drug offense only triggers immigration consequences if the sentence is one year or greater. (R.A.27). Based on this advice, the defendant pled guilty. (R.A.25). The possession with intent to distribute charge was reduced to simple possession pursuant to G.L. c. 94C, § 34 on October 2, 2007, and the defendant was sentenced to an agreed upon disposition of 11 months suspended for two years; the school zone charge was dismissed. (R.A.29). A conviction for possession of a Class B substance,

regardless of the sentence, makes the defendant deportable under the controlled substance ground of removability pursuant to 8 U.S.C. §1227(a)(2)(B).

ISSUE OF LAW RAISED BY THE APPEAL

WHETHER THIS COURT SHOULD CONTINUE TO PROVIDE RELIEF PURSUANT TO PADILLA V. KENTUCKY TO NON-CITIZEN DEFENDANTS WHOSE CONVICTIONS BECAME FINAL PRIOR TO MARCH 31, 2010.

STATEMENT REGARDING PRESERVATION OF ISSUES PRESENTED

The defendant argued in his Motion to Vacate Plea and Motion to Reconsider (R.A.6, 56), orally at the hearing on the Motion to Vacate Plea, (Tr.3-9), and in his brief in the Appeals Court (D.Br. 1-22), that the defendant's attorney affirmatively misadvised him of the immigration consequences of pleading guilty, and that "a decision to reject the plea bargain would have been rational under the circumstances." Clarke, 460 Mass. at 35, citing Padilla, 130 S. Ct. at 1485.

In both his Motion to Vacate in the trial court and his brief in the Appeals Court, the defendant cited Clarke for the proposition that Padilla applies retroactively to cases on collateral review. (R.A.13; D. Br. at 6). The defendant also argued in his Motion

to Vacate and in his brief in the Appeals Court that his rights were violated under both the Sixth and Fourteenth Amendments to the United States Constitution as well as article 12 of the Massachusetts Declaration of Rights. (R.A.10, 13; D. Br. at 4).

ARGUMENT

- I. BECAUSE THIS COURT IS NOT REQUIRED TO APPLY THE TEAGUE ANALYSIS TO DETERMINE WHEN A NEW RULE IS ANNOUNCED, IT MAY USE THE TEAGUE FRAMEWORK BUT REACH A DIVERGENT CONCLUSION FROM CHAIDEZ, AND SHOULD THUS CONTINUE TO FIND PADILLA RETROACTIVE.

In Danforth v. Minnesota, 552 U.S. 264 (2008), the Supreme Court held that its own retroactivity analysis in Teague v. Lane, 489 U.S. 288 (1989), has "no bearing on whether States [can] provide broader relief in their own post-conviction proceedings." Danforth, 552 U.S. at 277. The Court emphatically stated that "Teague...does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under federal rules." Id. at 282. "Teague...cannot be read as imposing a binding obligation on state courts," Id. at 278, and therefore this Court can continue to find that Padilla is retroactive, such that Mr. Sylvain may

seek a remedy for the deprivation of his right to effective assistance of counsel.

In Commonwealth v. Bray, 407 Mass. 296 (1990), this Court relied upon the federal common law framework in Teague for guidance in crafting its own method of identifying when a new rule has been announced. Bray, 407 Mass. at 301. Using the Teague framework, this Court has found that "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or Federal Government." Id. at 302 (citing Teague). Utilization of the Teague framework, however, does not create "a binding obligation" on the Court to reach the same conclusion as the Supreme Court when determining whether a case announces a new rule. See Danforth v. Minnesota, 552 U.S. 264 (2008). "Teague was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings," Danforth, 552 U.S. at 280; therefore, so long as this Court is not violating the federal constitution, it may reject the Supreme Court's new rule analysis under Teague.

In Commonwealth v. Clarke, 460 Mass. 30 (2011), this Court made clear that Padilla v. Kentucky had not announced a new rule, but instead was the application

of an old rule to new facts. This Court found that due to "the extensive changes in immigration law in the past decades," professional norms had evolved to support the view that counsel must provide advice regarding the immigration consequences of a conviction. Id. at 41. See also, Commonwealth v. Melendez-Diaz, 460 Mass. 238 (2011) (distinguishing Clarke based on the evolving professional standards surrounding immigration advice). This Court further reviewed the specific Massachusetts professional standards and concluded that such advice had been part of competent representation for almost 20 years. Clarke, 460 Mass. at 45-46. The protection outlined in Padilla was therefore "more akin to the affirmation of an existing constitutional obligation than the imposition of a new obligation on the States and Federal government." Melendez-Diaz, 460 Mass. at 247. The reasoning in Clarke provided ample support for this Court's finding that Padilla was not a new rule. Mr. Sylvain is entitled to the benefit of that decision and the Court need not abandon it.

II. PRINCIPLES OF FUNDAMENTAL FAIRNESS, ARISING FROM THE BROAD PROTECTIONS OF ARTICLE 12, REQUIRE THE RETROACTIVE APPLICATION OF THE PADILLA HOLDING.

As this Court has recognized, beyond the simple formula laid out in Teague, the retroactive application of judicial decisions – and in particular judicial decisions that explicate individual constitutional rights – implicates principles of fundamental fairness. See Commonwealth v. Melendez-Diaz, 460 Mass. 238, 248 (2011) (declining to modify the Teague test where there was “no fundamental injustice or unfairness” in giving a rule only prospective effect); Commonwealth v. Amirault, 424 Mass. 618, 639 (1997). Fairness concerns are at their zenith where, as here, the constitutional right at issue is a “fundamental” one that is “essential to individual liberty and security, and to a fair trial.” Commonwealth v. Means, 454 Mass. 81, 88 (2009); Lavalle v. Justices in the Hampden Superior Court, 442 Mass. 228, 234 (2004). The question is whether this Court should hold that even though Mr. Sylvain was deprived of his “fundamental” and “essential” right to counsel, because that deprivation occurred before March 31, 2010, Mr. Sylvain should have no remedy.

Such a position runs afoul of the broad due process protections of article 12.

This Court has repeatedly construed article 12 to provide broader protections than its federal constitutional counterparts. See, e.g., Commonwealth v. Mavredakis, 430 Mass. 848, 858 (2000) (art. 12 includes broader right against self-incrimination than provided under the Fifth Amendment); Commonwealth v. Rainwater, 425 Mass. 540, 553-54 (1997) (art. 12 includes broader right to counsel than provided by the Sixth Amendment); Commonwealth v. Hodge, 386 Mass. 165, 169-70 (1982) (art. 12 includes greater protections against ineffective assistance of counsel than the Sixth Amendment).²

Of concern in determining the retroactivity of constitutional decisions is the due process provision of article 12, which is the constitutional embodiment of fundamental fairness. See Commonwealth v. Lyons, 397 Mass. 644, 646-47 (1986) (noting that the phrase

² "[S]tandards under a state constitution that are more strict than the 'lowest common denominator' determined under the United States Constitution may be appropriate in the special circumstances of a given state or by a different measure of what essential fairness requires." Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to the Cognate Provisions of the United States Constitution*, 14 Suffolk U.L. Rev. 887, 921 (1980).

"law of the land" in article 12 "refers, in language found in Magna Carta, to the concept of due process of law."). Where the substantive right at issue is tied to fundamental fairness, the due process provision of article 12 can be used to more broadly effectuate those rights. See Commonwealth v. Patton, 458 Mass. 119, 125 (2010) (taking a "more expansive view than the Supreme Court" and holding that "simple justice" requires assistance of counsel in probation surrender hearings).

The right to effective assistance of counsel, which is the efflorescence of the right to counsel under both article 12 and the Sixth Amendment, has deep roots in Massachusetts, where it has long been tied to the fundamental fairness of criminal proceedings. By 1641, the Massachusetts settlement authorized counsel by unpaid attorneys in Article 26 of *The Body of Liberties*, the settlement's code. Edgar J. McManus, *Law and Liberty in Early New England: Criminal Justice and Due Process, 1620-1692*, at 95 (1993). Our Commonwealth's earliest history, presaging the language of article 12 of our Declaration of Rights, reflects the poignance of John Adams's defense of the British soldiers charged with

murder in the Boston Massacre. Morris L. Ernst & Alan O. Schwartz, *The Right to Counsel and the "Unpopular Cause"*, 20 U. Pitt. L. Rev. 727, 728 (1959). By 1807, this Court was assigning counsel for indigent defendants charged with murder, Commonwealth v. Hardy, 2 Mass. (Tyng) 303, 314; 316 (1807), well before the Legislature formally authorized that practice. See St. 1820, c.14, s. 8.

"The essential element of fairness in the administration of justice depends on the right to counsel." Commonwealth v. Murphy, 448 Mass. 452, 465 (2007) (internal citations and punctuation omitted).

"The right to counsel is of little value unless there is an expectation that counsel's assistance will be effective." In re Stephen, 401 Mass. 144, 149 (1987).

Mr. Sylvain was deprived of that essential right to effective assistance of counsel, which undermined the administration of justice to such a degree that it would be fundamentally unfair to divest him of a remedy based solely on the date his conviction became final. The refusal to apply the Padilla holding retroactively would deny Mr. Sylvain, and all those similarly situated, due process of law under article 12 of the Massachusetts Declaration of Rights.

III. BECAUSE RELIEF UNDER PADILLA MAY ONLY BE SOUGHT BY DEFENDANTS PURSUANT TO RULE 30 MOTIONS, SUCH CLAIMS FOR RELIEF SHOULD BE TREATED AS DIRECT REVIEW.

As discussed earlier, in Danforth v. Minnesota, 552 U.S. 264 (2008), the Supreme Court released state courts to give broader retroactive effect to new rules. Strict application of Teague or Bray is inappropriate when considering motions for relief under Padilla pursuant to Mass. R. App. P. 30(b), because such motions could not be properly raised in direct appeals. In this context, Rule 30 motions themselves should be treated as direct appeals, so that the retroactivity analysis under Teague and Bray is inapplicable. See Commonwealth v. Clarke, 460 Mass. 30, 34 (2011) (retroactivity analysis only applies to "cases on collateral review").

In Commonwealth v. De La Zerda, 416 Mass. 247 (1993), this Court noted that "a motion for a new trial under Mass. R. Crim. P. 30 has been treated as collateral for the purposes of determining the retroactive application of a new rule of criminal law," citing Teague and Bray. 416 Mass. at 250. "However, a [R]ule 30 motion challenging a guilty plea ... might be seen as a direct appeal, in that such a

motion provides the only avenue for appellate review of the validity of the guilty plea." Id. (internal citations omitted). Such concern applies equally to Padilla motions following trials, because trial transcripts will never reveal both the deficient performance of counsel (which almost invariably involves attorney-client communications necessarily absent from the record) and prejudice (which necessarily involves immigration consequences and factors not directly relevant to the criminal charges). See Commonwealth v. Housen, 458 Mass. 702, 711-712 (2011) ("We [] have said that an ineffective assistance of counsel claim raised in the direct appeal . . . generally will succeed only if attorney error appears indisputably on the trial record."). Therefore, it would be fundamentally unfair to apply the traditional retroactivity analysis to Padilla claims that could not have been brought on direct appeal.

Accordingly, where State collateral challenges are based upon claims of ineffective assistance of counsel under Padilla, Rule 30 motions should be treated identically to claims on direct review for purposes of retroactivity, and new rules involving the

Sixth Amendment Assistance of Counsel Clause should apply in all such cases.

IV. CHAIDEZ DID NOT ERODE THE RETROACTIVE APPLICATION OF A DEFENDANT'S SIXTH AMENDMENT RIGHT NOT TO BE AFFIRMATIVELY MISADVISED REGARDING THE IMMIGRATION CONSEQUENCES OF HIS CONVICTION.

Where a defendant receives affirmative misrepresentation and is misled by his attorney concerning the immigration consequences of his guilty plea, his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution is violated and he should be able to pursue a remedy notwithstanding the Court's holding in Chaidez. The Court in Chaidez specifically distinguished claims such as Mr. Sylvain's - where he was affirmatively misadvised by his attorney - from the claim at issue in that case, involving failure to advise. The Court referred to "a separate rule for material misrepresentations," Chaidez, slip. op. at 13, such as the misadvice given to Mr. Sylvain by his attorney. See also Padilla, 130 S. Ct. at 1484.

Mr. Sylvain's attorney did not simply fail to advise him that his plea would render him deportable. He affirmatively assured him that it would not result in precisely the devastating consequence that Mr.

Sylvain now faces - removal from his home and his family. His attorney's affirmative, material misrepresentations constituted ineffective assistance of counsel. Even under Chaidez, the Sixth Amendment right not to be affirmatively misadvised by counsel regarding immigration consequences has retroactive effect and therefore Mr. Sylvain should be granted relief.

**STATEMENT OF REASONS WHY DIRECT APPELLATE
REVIEW IS APPROPRIATE**

This case presents an opportunity for this Court to answer the urgent question of substantial public importance of whether the rule announced by Padilla continues to be applied retroactively as it has been since this Court's decision in Clarke. This appeal raises (1) a question of first impression or a novel question of law which should be submitted for final determination to this Court; (2) a question of law concerning the Constitution of the Commonwealth, and (3) a question of such public interest that justice requires a final determination by the full Court.

Mass. R. App. P. 11(a).

Following the Supreme Court's decision in Chaidez, noncitizen defendants and inferior courts are

without guidance as to whether convictions obtained prior to March 31, 2010 may continue to be challenged under Padilla and Clarke. This question should be resolved affirmatively so that Mr. Sylvain, and other non-citizens similarly situated, can pursue a remedy when the denial of the right to effective assistance of counsel may result in banishment from home and family.

CONCLUSION

Based upon the foregoing points and authorities, and in light of the immediate importance of this issue, the defendant requests that this Honorable Court grant his petition for direct appellate review.

Respectfully Submitted,
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Dated: March 4, 2013

Certificate of Compliance

I hereby certify that the brief in this matter complies with the rules of court that pertain to the filing of briefs, including but not limited to: Mass. R. App. P. 16(a)(6) (pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules, regulations); Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (form of briefs, appendices and other papers).

/s/ Laura M. Banwarth

Laura M. Banwarth

CERTIFICATE OF SERVICE

I, Laura M. Banwarth, hereby certify that on this 4th day of March, 2013, I have caused a true and complete copy of the defendant's Application for Direct Appellate Review, to be served by hand, to:

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/s/ Laura M. Banwarth
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Addendum

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Massachusetts Declaration of Rights

Article XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his council at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

United States Constitution, Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

8 U.S.C. §1227(a)(2)(B)

(B) Controlled substances

(i) Conviction Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

(ii) Drug abusers and addicts Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.



PART I ADMINISTRATION OF THE GOVERNMENT
(Chapters 1 through 182)

TITLE XV REGULATION OF TRADE

CHAPTER 94C CONTROLLED SUBSTANCES ACT

Section 32A Class B controlled substances; unlawful manufacture, distribution, dispensing or possession with intent to manufacture, etc.; eligibility for parole

Section 32A. (a) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a controlled substance in Class B of section thirty-one shall be punished by imprisonment in the state prison for not more than ten years, or in a jail or house of correction for not more than two and one-half years, or by a fine of not less than one thousand nor more than ten thousand dollars, or both such fine and imprisonment.

(b) Any person convicted of violating this section after one or more prior convictions of manufacturing, distributing, dispensing, or possessing with the intent to manufacture, distribute or dispense a controlled substance as defined by section thirty-one of this chapter under this or any other prior law of this jurisdiction or of any offense of any other jurisdiction, federal, state, or territorial, which is the same as or necessarily includes the elements of said offense shall be punished by a term of imprisonment in the state prison for not less than three nor more than ten years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of three years and a fine of not less than two thousand and five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(c) Any person who knowingly or intentionally manufactures, distributes, dispenses or possesses with intent to manufacture, distribute or dispense phencyclidine or a controlled substance defined in clause (4) of paragraph (a) or in clause (2) of paragraph (c) of class B of section thirty-one shall be punished by a term of imprisonment in the state prison for not less than two and one-half nor more than ten years or by imprisonment in a jail or house of correction for not less than one nor more than two and one-half years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of one year and a fine of not less than one thousand nor more than ten thousand dollars may be imposed but not in lieu of the mandatory minimum one year term of imprisonment, as established herein.

(d) Any person convicted of violating the provisions of subsection (c) after one or more prior convictions of manufacturing, distributing, dispensing or possessing with the intent to manufacture, distribute, or dispense a controlled substance, as defined in section thirty-one or of any offense of any other jurisdiction, either federal, state or territorial, which is the same as or necessarily includes, the elements of said offense, shall be punished by a term of imprisonment in the state prison for not less than five nor more than fifteen years and a fine of not less than two thousand five hundred nor more than twenty-five thousand dollars may be imposed but not in lieu of the mandatory minimum term of imprisonment, as established herein.

(e) Any person serving a mandatory minimum sentence for violating this section shall be eligible for parole after serving one-half of the maximum term of the sentence if the sentence is to the house of correction, provided that said person shall not be eligible for parole upon a finding of any one of the following aggravating circumstances:

(i) the defendant used violence or threats of violence or possessed a firearm, rifle, shotgun, machine gun or a weapon described in paragraph (b) of section 10 of chapter 269, or induced another participant to do so, during the commission of the offense;

(ii) the defendant engaged in a course of conduct whereby he directed the activities of another who committed any felony in violation of chapter 94C; or

(iii) the offense was committed during the commission or attempted commission of a violation of section 32F or section 32K of chapter 94C.

A condition of such parole may be enhanced supervision; provided, however, that such enhanced supervision may, at the discretion of the parole board, include, but shall not be limited to, the wearing of a global positioning satellite tracking device or any comparable device, which shall be administered by the board at all times for the length of the parole.



PART I ADMINISTRATION OF THE GOVERNMENT (Chapters 1 through 182)
TITLE XV REGULATION OF TRADE
CHAPTER 94C CONTROLLED SUBSTANCES ACT
Section 32J Controlled substances violations in, on, or near school property; eligibility for parole

Section 32J. Any person who violates the provisions of section thirty-two, thirty-two A, thirty-two B, thirty-two C, thirty-two D, thirty-two E, thirty-two F or thirty-two I while in or on, or within one thousand feet of the real property comprising a public or private accredited preschool, accredited headstart facility, elementary, vocational, or secondary school whether or not in session, or within one hundred feet of a public park or playground shall be punished by a term of imprisonment in the state prison for not less than two and one-half nor more than fifteen years or by imprisonment in a jail or house of correction for not less than two nor more than two and one-half years. No sentence imposed under the provisions of this section shall be for less than a mandatory minimum term of imprisonment of two years. A fine of not less than one thousand nor more than ten thousand dollars may be imposed but not in lieu of the mandatory minimum two year term of imprisonment as established herein. In accordance with the provisions of section eight A of chapter two hundred and seventy-nine such sentence shall begin from and after the expiration of the sentence for violation of section thirty-two, thirty-two A, thirty-two B, thirty-two C, thirty-two D, thirty-two E, thirty-two F or thirty-two I.

Lack of knowledge of school boundaries shall not be a defense to any person who violates the provisions of this section.

Any person serving a mandatory minimum sentence for violating this section shall be eligible for parole after serving one-half of the maximum term of the sentence if the sentence is to a house of correction, except that such person shall not be eligible for parole upon a finding of any 1 of the following aggravating circumstances:

- (i) the defendant used violence or threats of violence or possessed a firearm, rifle, shotgun, machine gun or a weapon described in paragraph (b) of section 10 of chapter 269, or induced another participant to do so, during the commission of the offense;
- (ii) the defendant engaged in a course of conduct whereby he directed the activities of another who committed any felony in violation of chapter 94C.
- (iii) the offense was committed during the commission or attempted commission of the a

violation of section 32F or section 32K of chapter 94C.

A condition of such parole may be enhanced supervision; provided, however, that such enhanced supervision may, at the discretion of the parole board, include, but shall not be limited to, the wearing of a global positioning satellite tracking device or any comparable device, which shall be administered by the board at all times for the length of the parole.



PART I ADMINISTRATION OF THE GOVERNMENT (Chapters 1 through 182)
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TITLE XV REGULATION OF TRADE

CHAPTER 94C CONTROLLED SUBSTANCES ACT
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Section 34 Unlawful possession of particular controlled substances, including heroin and marihuana

Section 34. No person knowingly or intentionally shall possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the provisions of this chapter. Except as provided in Section 32L of this Chapter or as hereinafter provided, any person who violates this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars, or by both such fine and imprisonment. Any person who violates this section by possessing heroin shall for the first offense be punished by imprisonment in a house of correction for not more than two years or by a fine of not more than two thousand dollars, or both, and for a second or subsequent offense shall be punished by imprisonment in the state prison for not less than two and one-half years nor more than five years or by a fine of not more than five thousand dollars and imprisonment in a jail or house of correction for not more than two and one-half years. Any person who violates this section by possession of more than one ounce of marihuana or a controlled substance in Class E of section thirty-one shall be punished by imprisonment in a house of correction for not more than six months or a fine of five hundred dollars, or both. Except for an offense involving a controlled substance in Class E of section thirty-one, whoever violates the provisions of this section after one or more convictions of a violation of this section or of a felony under any other provisions of this chapter, or of a corresponding provision of earlier law relating to the sale or manufacture of a narcotic drug as defined in said earlier law, shall be punished by imprisonment in a house of correction for not more than two years or by a fine of not more than two thousand dollars, or both.

If any person who is charged with a violation of this section has not previously been convicted of a violation of any provision of this chapter or other provision of prior law relative to narcotic drugs or harmful drugs as defined in said prior law, or of a felony under the laws of any state or of the United States relating to such drugs, has had his case continued without a finding to a certain date, or has been convicted and placed on probation, and if, during the period of said continuance or of said probation, such person does not violate any of the conditions of said continuance or said probation, then upon the expiration of such period the court may dismiss the proceedings against him, and may order sealed all official records relating to his

arrest, indictment, conviction, probation, continuance or discharge pursuant to this section; provided, however, that departmental records which are not public records, maintained by police and other law enforcement agencies, shall not be sealed; and provided further, that such a record shall be maintained in a separate file by the department of probation solely for the purpose of use by the courts in determining whether or not in subsequent proceedings such person qualifies under this section. The record maintained by the department of probation shall contain only identifying information concerning the person and a statement that he has had his record sealed pursuant to the provisions of this section. Any conviction, the record of which has been sealed under this section, shall not be deemed a conviction for purposes of any disqualification or for any other purpose. No person as to whom such sealing has been ordered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failure to recite or acknowledge such arrest, indictment, conviction, dismissal, continuance, sealing, or any other related court proceeding, in response to any inquiry made of him for any purpose.

Notwithstanding any other penalty provision of this section, any person who is convicted for the first time under this section for the possession of marihuana or a controlled substance in Class E and who has not previously been convicted of any offense pursuant to the provisions of this chapter, or any provision of prior law relating to narcotic drugs or harmful drugs as defined in said prior law shall be placed on probation unless such person does not consent thereto, or unless the court files a written memorandum stating the reasons for not so doing. Upon successful completion of said probation, the case shall be dismissed and records shall be sealed.

It shall be a prima facie defense to a charge of possession of marihuana under this section that the defendant is a patient certified to participate in a therapeutic research program described in chapter ninety-four D, and possessed the marihuana for personal use pursuant to such program.

Mass. R. App. P. 11(a)

(a) Application; When Filed; Grounds. An appeal within the concurrent appellate jurisdiction of the Appeals Court and Supreme Judicial Court shall be entered in the Appeals Court before a party may apply to the Supreme Judicial Court for direct appellate review. Within twenty days after the docketing of an appeal in the Appeals Court, any party to the case (or two or more parties jointly) may apply in writing to the Supreme Judicial Court for direct appellate review, provided the questions presented by the appeal are: (1) questions of first impression or novel questions of law which should be submitted for final determination to the Supreme Judicial Court; (2) questions of law concerning the Constitution of the Commonwealth or questions concerning the Constitution of the United States which have been raised in a court of the Commonwealth; or (3) questions of such public interest that justice requires a final determination by the full Supreme Judicial Court. Oral argument in support of an application will not be permitted except by order of court.

Mass. R. Crim. P. 30(b)

(b) New Trial. The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.