



The Commonwealth of Massachusetts

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Immigration Cases Notes for Massachusetts Criminal Defense Attorneys **April 2012**

From the U.S. Supreme Court:

Chaidez v. U.S., 655 F.3d 684 (7th Cir. 2011), *certiorari granted*, 2012 U.S. LEXIS 3335 (Apr. 30, 2012).

This Seventh Circuit case held that *Padilla v. Kentucky* was not retroactive, and thus only applied to pleas occurring after *Padilla* was decided on March 31, 2010. The Tenth Circuit has made the same holding, while the Third Circuit and the Massachusetts Supreme Judicial Court have found that *Padilla* is retroactive. The SJC case on this matter is *Commonwealth v. Clarke*, 460 Mass. 30 (2011), holding that *Padilla* is retroactive to April 1, 1997. The Supreme Court has granted cert to resolve the evolving nationwide split on this issue.

Practice note: Unless the Supreme Court rules otherwise, *Padilla* remains retroactive in Massachusetts under *Clarke*.

From the Massachusetts Appeals Court:

Commonwealth v. Martinez, 81 Mass.App.Ct. 595 (Apr. 18, 2012).

In this case, the defendant moved for a new trial based on *Padilla*. The trial court denied the motion based on a lack of prejudice, holding that because the Commonwealth's case was strong, the defendant was unable to prove that the outcome of the case would have been any different. The Appeals Court remanded the case back to the trial court, holding that, in light of *Commonwealth v. Clarke*, the court had applied the wrong standard in determining prejudice.

Practice note: Under *Clarke*, a defendant can show prejudice in any one of three ways: 1) that he had a substantial ground of defense; 2) there was a reasonable probability that a different plea bargain could have been achieved; or 3) special circumstances demonstrate that the defendant would have placed particular importance on immigration consequences. In preparing a motion for new trial, it is important to demonstrate that a client fits into as many of these

categories as possible. Details about the client's background will help demonstrate special circumstances under the third ground.

Commonwealth v. Lamitie, 2012 Mass. App. Unpub. LEXIS 517 (Apr. 24, 2012).

In this case, the defendant's second motion for new trial, based on *Padilla*, was denied due to a failure to show prejudice. The court observed that the evidence was strong against the defendant, that the record suggested that the defendant was mainly concerned about avoidance of a mandatory minimum sentence, and that he had received the judicial immigration warnings twice. The court held that though provision of the judicial warnings is not a substitute for advice from the defendant's attorney, it is relevant in analyzing prejudice.

Practice note: In this type of motion for new trial, the Commonwealth commonly argues that a proper reading of the judicial warnings should defeat a motion for new trial. This case demonstrates that while the judicial warnings are relevant to prejudice, they do not discharge trial counsel from his duty to advise his client about immigration consequences, and that prejudice can still be shown, even when the warning was given.

From the Board of Immigration Appeals:

Matter of M-W-, 25 I&N Dec. 748 (BIA Apr. 9, 2012)

The respondent was convicted of second degree murder in Michigan, an offense that did not require an intent to kill. The offense involved an incident in which the respondent was drunk driving and rear-ended another car, killing the occupants. He was sentenced to a term of imprisonment of 8-20 years. He was later placed in removal proceedings, and the offense was charged as an aggravated felony under both the murder category and the crime of violence category. The BIA held that "depraved heart murder," or murder caused by extremely reckless conduct, constituted murder for purposes of the aggravated felony statute because the offense met the generic definition of murder that legislators had in mind when including murder as a type of aggravated felony. The BIA also held that evidence of intoxication did not prevent a showing that the respondent was capable of acting with extreme recklessness.

Practice note: There are few BIA cases dealing with the murder category of aggravated felonies, as most murder cases easily fit into the "crime of violence" category of aggravated felonies. Presumably, the BIA chose to discuss the murder category of aggravated felonies in this case because it is questionable whether a motor vehicle homicide could be considered a crime of violence. Instead of undergoing the typical categorical approach set out by *Taylor* and *Shepard*, which requires an analysis of the state criminal statute, the BIA decided instead to look at the common law or generic definition of murder to find that this second degree murder offense was categorically a murder-based aggravated felony. While the outcome in this case is not surprising, it is concerning that the BIA appears to be broadening the immigration consequences for those convicted of offenses requiring only recklessness.