The Commonwealth of Massachusetts
Committee for Public Counsel Services
Immigration Impact Unit
21 McGrath Highway, Somerville, MA 02143

TEL: 617-623-0591
FAX: 617-623-0936

ANTHONY J. BENEDETTI
CHIEF COUNSEL

WENDY S. WAYNE
DIRECTOR

Immigration Cases Notes for Massachusetts Criminal Defense Attorneys March 2012

From the U.S. Supreme Court:

Lafler v. Cooper, 2012 U.S. LEXIS 2322 (Mar. 21, 2012) and ***Missouri v. Frye***, 2012 U.S. LEXIS 2321. (Mar. 21, 2012).

These cases hold that the Sixth Amendment right to effective assistance of counsel, as articulated by the Court in *Strickland v. Washington*, applies to the plea bargaining stage of the criminal process, and that prejudice can be established even if a defendant ultimately had a full and fair trial. In *Cooper*, the defendant chose to reject a plea agreement and go to trial, based on his trial counsel's erroneous advice. The Court held that a fair trial did not remedy this deficient performance, and that the defendant had still established prejudice. In *Frye*, trial counsel failed to communicate a prosecutor's plea proposal and it expired. The defendant later accepted a less favorable plea agreement. The Court held that a defendant can show prejudice under these circumstances if he demonstrates a reasonable probability not only that he would have accepted the more favorable plea offer, but also that the plea would have been accepted by the trial court and would not have been cancelled by the prosecutor.

Practice Note: These cases may be applicable to motions for new trial under *Padilla v. Kentucky*. They support an argument that an immigrant who chooses to go to trial after he was not advised about immigration consequences may still be able to establish prejudice. The SJC is currently reviewing this issue in *Commonwealth v. Marinho*, docket SJC-11058, with oral argument likely in May.

Vartelas v. Holder, 2012 U.S. LEXIS 2540 (Mar. 28, 2012).

In 1994, Mr. Vartelas was convicted of conspiring to make a counterfeit security and served a four-month prison sentence. At that time, he had lived in the U.S. for sixteen years and had been a permanent resident for six years. The offense was considered a crime involving moral turpitude. While the offense made him inadmissible, it did not make him deportable. Under the law in effect at the time of his plea, he could still make short trips outside of the U.S. without being subject to the rules of inadmissibility (called the rules of "exclusion" prior to 1996), because he was a permanent resident.

In 1996, the immigration law changed in relation to travel abroad for permanent residents who had been convicted of crimes involving moral turpitude. The new law, codified at 8 U.S.C. §1101(a)(13)(C), stated that any permanent resident who had committed a crime involving moral turpitude would be considered an

applicant for admission upon travel abroad. Thus, the rules of inadmissibility would apply, regardless of the nature or length of the trip abroad. From a practical standpoint, this meant that longtime permanent residents who were inadmissible due to their criminal history could be placed in removal proceedings after any absence, however brief, from the U.S., and could be denied entry and removed from the U.S.

In 2003, Mr. Vartelas traveled abroad, as he had many times in the past. However, this time, upon reentry to the U.S., he was arrested and charged with being inadmissible due to his 1994 criminal offense. He was ultimately ordered removed and he appealed that decision, arguing that he should not have been subject to the rules of inadmissibility.

The Supreme Court agreed and held that the particular provision of the 1996 immigration laws that applied to these circumstances was not retroactive. Thus, defendants convicted of offenses prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") are not applicants for admission after "innocent, casual and brief excursions" abroad, as long as none of the other factors listed in 8 U.S.C. §1101(a)(13)(A) are present. As a result, Mr. Vartelas should not have been placed in removal proceedings because the rules of inadmissibility should not have been applied to him.

Practice Note: The key to this decision is to understand that the rules of inadmissibility and deportability are different. It is common for a permanent resident, such as Mr. Vartelas, to be inadmissible but not deportable. The only way he could be placed in removal proceedings is if the grounds of inadmissibility applied to him. Since the Court held that they did not, he was allowed to stay in the U.S. and continue living his life here.

The other important point about this case is that it applies to a relatively small class of people: only those who were convicted of an offense covered by 8 U.S.C. §1182(a)(2) prior to the enactment of IIRIRA on September 30, 1996. Immigrants who have such offenses on their records that post-date the enactment of IIRIRA do not benefit from this decision.

Finally, this decision emphasizes the importance of advising a client with a criminal history not to travel abroad, even if she has traveled abroad in the past with no repercussions. It took Immigration seven years to arrest Mr. Vartelas, despite his frequent travel abroad.

From the U.S. Court of Appeals for the First Circuit:

Idy v. Holder, 2012 U.S. App. LEXIS 6098 (1st Cir., Mar. 23, 2012).

Mr. Idy was convicted of three counts of reckless conduct, a New Hampshire assault offense that requires placing the victim in danger of serious bodily injury. The First Circuit held that offenses involving recklessness can, under some circumstances, be crimes involving moral turpitude (CIMT). Because this offense included both recklessness and an element of serious bodily injury, the court affirmed that it was a CIMT.

Practice Note: This case is of interest in that it alludes to, but does not specifically uphold, the Attorney General's recent, expansive case on CIMT's, *Matter of Silva-Trevino*. That case held that a state of mind of at least recklessness, coupled with "reprehensible conduct" was a CIMT. It also held that, under some circumstances, a court is not restricted to reviewing only the record of conviction in determining whether an offense involves moral turpitude, and instead can look at the underlying facts of the case. In the *Idy* case, the First Circuit cites cases decided prior to *Silva-Trevino*. It also mentions the *Silva-Trevino* definition of CIMTs, but attributes it to the BIA's underlying reasoning in the *Idy* case. The Court also provides a

detailed version of the underlying facts of the offenses, stating that it "shed[s] some light on the case." Yet, it does not expressly uphold, or even cite to, *Silva-Trevino*. As several other circuit courts have rejected *Silva-Trevino*, the immigration community continues to wait for the First Circuit's view of the case.

From the Board of Immigration Appeals:

Matter of Lanferman, 25 I&N Dec. 721 (BIA Mar. 9, 2012).

In this case, an immigrant was convicted of menacing in the second degree, a New York offense. The statute relating to this offense was broad, and could involve a firearm. Any immigrant convicted of a firearm offense is deportable. The BIA upheld the Immigration Judge's finding that the immigrant in this case had been convicted of a firearm offense, and discussed the application of the modified categorical approach to divisible statutes. It stated that where a criminal statute contains elements that could be proved by either deportable or non-deportable conduct (and thus is divisible), a court is required to look at the record of conviction to determine whether the offense makes an immigrant deportable. This is true, regardless of the structure of the statute at issue. Since the complaint in this case stated that the defendant used a revolver in the commission of the offense, the BIA held that it was a firearm offense.

Practice Note: This case simply confirms how the BIA applies the modified categorical approach to divisible statutes; it does not make new law. Note that the record of conviction includes the complaint, docket sheet, plea colloquy, jury instructions (if applicable), sentence and judgment. In cases in which there is a divisible statute and the modified categorical approach applies, an immigration judge may only look to these documents to determine whether the offense makes an immigrant deportable.

Unpublished Decision from the Massachusetts Appeals Court:

Commonwealth v. Angarita, 2012 Mass. App. Unpub. LEXIS 354 (Mar. 23, 2012).

In this case, the defendant pled guilty to cocaine trafficking in 1989. As a result of this conviction, he was ordered deported in 1990. He was later able to reopen his deportation proceedings because of his temporary resident status, but that status was also later terminated due to his conviction. The current status of his deportation proceedings was unclear.

The defendant sought to vacate his plea due to the fact that he had not been given the immigration warnings under G.L. c. 278, §29D. Although there was no evidence that he had received the warnings, the court held that he could not prove that he "may face or is facing" one of the immigration consequences present in the warning. The court held that, though the defendant had actually been ordered deported and had also lost his resident status as a result of the conviction, the government had not "threatened or initiated any deportation action." Thus, he could not prove that he may face or is facing deportation.

As a side note, the defendant also sought vacatur due to his attorney's failure to advise him of the immigration consequences of his plea, an argument based on *Padilla v. Kentucky* and *Commonwealth v. Clarke*, 460 Mass. 30 (2011). The court reiterated the holding in *Clarke* that *Padilla* only applies to pleas occurring after April 1, 1997.

Practice Note: This is another example of the Massachusetts Appeals Court's overly restrictive reading of the prejudice requirement for a motion to vacate under G.L. c. 278, §29D. However, it is also another example of the importance of generously documenting a motion for new trial with clear evidence of the client's immigration history and all the immigration consequences that a particular offense has for the client.