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Immigration Case Notes for Massachusetts Criminal Defense Attorneys
February and March 2013

U.S. Supreme Court

Chaidez v. United States, 568 U.S. __, 2013 U.S. LEXIS 1613 (Feb. 20, 2013)

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 applied the *Teague* analysis and concluded that *Padilla* was not a new rule and therefore should be applied retroactively. The SJC expressly declined 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). The SJC has recently allowed direct appellate review in *Commonwealth v. Sylvain*, SJC-11400, to address whether *Padilla* remains retroactive in Massachusetts in light of the *Chaidez* decision. Oral argument is scheduled for May 6, 2013.

Please see the attached practice advisory for further information.

First Circuit Court of Appeals

Patel v. Holder, 2013 U.S. App. LEXIS 2315 (1st Cir. Feb. 1, 2013)

This case examines the way in which courts may apply the modified categorical approach when determining whether an offense is a crime involving moral turpitude (CIMT). Mr. Nupur Patel, a legal permanent resident since 1998, had come to the U.S. with his family and attended high school here. During his freshman year at the University of Connecticut he was charged with conspiracy to commit larceny and

conspiracy to commit criminal trespass for a scheme in which he allegedly stole items from unlocked dorm rooms. He pled guilty, receiving a four and a half year suspended sentence.

In 2010, upon Mr. Patel's return from a trip abroad, he was stopped at the border and denied entry to the U.S. based on the fact that his convictions were considered CIMTs, thus making him inadmissible.

While in removal proceedings, Mr. Patel argued that his convictions were not CIMTs because the Connecticut statute under which he was convicted covers both temporary and permanent takings and under immigration law, only permanent takings are CIMTs. Mr. Patel argued that the record of conviction in his case did not establish his intent to permanently deprive the owners of their property. The immigration judge disagreed and found Mr. Patel removable.

The Board of Immigration Appeals (BIA) affirmed, finding that although the Connecticut statute criminalizes both temporary and permanent takings, using the modified categorical approach, it was clear from the record of conviction that Mr. Patel pled to the permanent taking portion of the statute. The Board based this decision on the prosecutor's recitation of the facts during the plea colloquy.

On appeal, the First Circuit reviewed the BIA's application of the modified categorical approach. Under the modified categorical approach, a court may look to the record of conviction to determine the conduct for which the defendant was convicted. The record of conviction includes the indictment, the plea, the verdict and the sentence.

To argue their positions, the parties relied entirely upon the prosecutor's statement of the facts during the plea colloquy, intricately parsing the language. On appeal, the Frist Circuit found that parsing the prosecutor's statement in this way was inappropriate and placed undue weight on the prosecutor's choice of words.

The Court then turned to an inference the BIA made that the "character and volume of items taken" suggested that Mr. Patel intended permanent deprivation. The court found that no matter how reasonable the inference was, the modified categorical approach does not allow such inferences. In reviewing the record of conviction, the BIA is not supposed to adjudicate the facts in a criminal case to determine whether they show that an individual committed a removable offense. The BIA must base decisions on removability solely on what offense an individual has been convicted of and not the underlying conduct. The court here found that such an inference would "impermissibly bridge the gap between the offense and the actual conduct involved. *Patel v. Holder*, 2013 U.S. App. LEXIS 2315 at *17 (internal quotes omitted).

Therefore, the court was unable to determine whether the defendant pled to a removable offense and remanded the case back to the BIA for further proceedings.

Practice Tip

This case is helpful to understand the ways in which the BIA and the First Circuit review statutes which criminalize multiple types of conduct. However, the Massachusetts larceny statute only involves a permanent taking, so it is always a CIMT. Despite that, there may be ways to negotiate a plea to avoid immigration consequences. Please fill out an intake form and contact the IIU (iiu@publiccounsel.net) to discuss the details of individual cases.

Board of Immigration Appeals

Matter of Ortega-Lopez, 26 I. & N. Dec. 99 (BIA 2013)

This case explores whether the offense of sponsoring or exhibiting an animal in an animal fighting venture under 7 U.S.C. § 2156(a)(1) is a crime involving moral turpitude (CIMT). Mr. Ortega-Lopez was placed in removal proceedings as a person who had not been lawfully admitted to the United States. He applied for relief from removal, but the Immigration Judge concluded that Mr. Ortega-Lopez was ineligible because he had been convicted of a CIMT. Mr. Ortega-Lopez appealed to the Board of Immigration Appeals (BIA or the Board).

On appeal, the BIA affirmed, concluding that sponsoring or exhibiting an animal in animal fighting is categorically a CIMT. The Board observed that in order to be a CIMT, "a crime requires two essential elements: a culpable mental state and reprehensible conduct." The Board concluded that the offense at issue met the first element because it required "knowingly" sponsoring or exhibiting an animal.

The Board further concluded that the offense involved reprehensible conduct, stating:

> As the Immigration Judge explained . . . animal fighting, unlike hunting or racing, is a spectacle of animal suffering engaged in purely for entertainment, 'the entire purpose of which is the intentional infliction of harm or pain on sentient beings that are compelled to fight, often to the death. The spectacle of forcing animals to cause each other extreme pain or death necessarily appeals to prurient interests.' . . . Thus, animal fighting is far from a victimless crime.

The BIA supported its conclusion by noting that all 50 States and the District of Columbia have outlawed both dog fighting and cock fighting, showing "that we, as a society, find animal fighting morally reprehensible, and thus morally turpitudinous."

<u>Practice Tip</u>

The Massachusetts statute prohibiting animal fighting, Mass. Gen. L. ch. 272, sec. 94, is more expansive than the sub-section of the federal statute at issue in this opinion. It criminalizes, among other things, promoting an animal fight and breeding animals for fighting. It is likely, however, under the broad reasoning in *Ortega-Lopez* that these offenses would also be considered CIMTs. Massachusetts also criminalizes being present at an animal fight, so long as you intended to be present at such an exhibition (ch. 272, sec. 95), willfully and maliciously killing, maiming, disfiguring, or poisoning the animal of another (ch. 266, sec. 112), and a wide range of animal cruelty (ch. 272, sec. 77). While this opinion focuses on abuse of animals for entertainment, the concern for animal welfare (the BIA notes that animal fighting is not a "victimless crime") suggests that intentional abuse of animals may be enough to constitute a CIMT. If you have a non-citizen client charged with such an offense, please contact the IIU.

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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

[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.

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 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 requesting 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*.