The Commonwealth of Massachusetts

Committee for Public Counsel Services

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Immigration Case Notes for Massachusetts Criminal Defense Attorneys September 2013

Unites States Court of Appeals for the First Circuit

Perez Santana v. Holder, 2013 U.S. App. LEXIS 19820 (1st Cir. Sept. 27, 2013)

In 2010, Vladamir Perez-Santana, a legal permanent resident (LPR) pled guilty in a Massachusetts state court to one count of possession with intent to distribute a controlled substance. After his plea, Mr. Perez-Santana was taken into ICE custody and placed in removal proceedings based solely upon this drug conviction. Shortly thereafter, he sought to vacate this conviction on constitutional grounds. However, before the motion to vacate was heard, ICE deported him to the Dominican Republic. After his removal, his motion to vacate was granted, thereby eliminating the basis for his removal. Mr. Perez-Santana then moved to reopen his immigration proceedings in order to return to the U.S. as an LPR.

The Department of Homeland Security (DHS) has long taken the position that once a noncitizen has been removed from the U.S., he is barred from filing a motion to re-open his immigration case and any pending motions to re-open are considered closed upon departure. In this case, the Board of Immigration Appeals (BIA) denied Mr. Perez-Santana's motion to re-open based upon this "post-departure bar." Mr. Perez-Santana appealed to the First Circuit arguing that the "post-departure" regulations conflicted with the clear language of the immigration statutes. The underlying statute provides that an alien may file one motion to reopen within 90 days of a final order of removal. 8 U.S.C. §1229a(c)(7)(A). There is no physical presence requirement. The regulation, on the other hand, provides that the BIA and the immigration judges have no jurisdiction over a motion to reopen when the noncitizen is no longer in the United States. 8 C.F.R. §1003.2(d).

The First Circuit's decision began by commenting that every other circuit court to hear cases regarding the post-departure bar has found that it either conflicts with the clear language of the statute or is an impermissible contraction of the agency's jurisdiction. After doing the necessary *Chevron* analysis of the DHS's post-departure bar regulation (to determine whether the regulation was a valid exercise of discretion conferred to DHS by statute), the court found that the plain meaning of the statute controlled and did not provide for a post-departure bar and therefore, Mr. Perez-Santana's motion to reopen was timely and appropriately filed. The BIA's denial of the motion was vacated and the case was remanded to the BIA for review of the merits of the Motion to Reopen.

NB: In a companion case, *Bolieiro v. Holder*, 2013 U.S. App. LEXIS 19873 (1st Cir. Sept. 27, 2013), the court left open the question of whether the post-departure bar remains valid where the motion to reopen was filed outside the 90 days provided by statute to file.

Practice Tip:

When a client is deported prior to a decision on a post-conviction motion, the attorney should proceed with the motion and try to remain in contact with the client or client's family. If the post-conviction motion is granted, eliminating the client's only basis for removal, counsel should contact the IIU to discuss the possibility of filing a motion to reopen immigration proceedings to return the client to the U.S.

See the attached press release of the Boston College Post-Deportation Human Rights Project for information on a similar case.

Massachusetts Supreme Judicial Court

Commonwealth v. Sylvain, 466 Mass. 422 (2013)

In this case, the SJC held that despite the U.S. Supreme Court's ruling in *Chaidez v. U.S.*, 133 S.Ct. 1103 (2013), the duty of defense counsel to accurately advise noncitizen clients of immigration consequences, as announced in *Padilla v. Kentucky*, is retroactive under Massachusetts common law for convictions obtained after April 1, 1997. The SJC also found a separate duty to properly advice noncitizen defendants under article 12 of the Massachusetts Declaration of Rights. **Please see the attached practice advisory for further information.**

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Lawful Permanent Resident Returned to US After Wrongful Deportation

Post-Deportation Human Rights Project, Boston College
www.bc.edu/postdeportation

The Post-Deportation Human Rights Project, together with the Criminal Justice Institute at Harvard Law School (CJI), has successfully returned a young man to the United States and to his family after two and a half years in exile. Victor Veloz-Risik – a US lawful permanent resident since 2006 – was deported in early 2011 due to a conviction for a drug offense. Although this was his first and only conviction, the deportation laws are particularly harsh when it comes to drug convictions. Most such deportees face the prospect of lifetime banishment.

In June 2013, however, the Somerville District Court vacated his conviction, agreeing with CJI attorney-supervisor Robert Proctor and law student Jon McCoy (HLS '13) that Victor had been deprived of due process. His conviction had been based on a drug certification signed by crime lab chemist Annie Dookhan. Ms. Dookhan has been charged with 27 counts of perjury, tampering with evidence, obstructing justice and other charges after an investigation revealed that she had been falsifying results at a state crime lab in Massachusetts since 2003. This revelation called into question the reliability of evidence used in at least 34,000 criminal prosecutions, including Victor's criminal case.

Noncitizens who are still on US territory may have their cases reopened by an immigration judge if the conviction that formed the basis for their deportation has been vacated. For those, like Victor, who have already been removed from the country, the process is much more difficult, often impossible. A federal regulation purports to bar individuals who have been deported from asking immigration judges to reopen their deportations cases, even if the interpretation of the law has changed or the conviction is vacated. The Post-Deportation Human Rights Project, together with other organizations and law firms, has challenged this regulation and other impediments to such re-consideration. Nearly all federal circuit courts have now invalidated aspects of the regulation, but major hurdles remain for those seeking post-deportation justice. PDHRP lawyer, Jessica Chicco, convinced the Department of Homeland Security to join our motion to reopen the case. An El Paso Immigration Judge then dismissed the charges. As a result, Victor has returned to the US to resume his status as a lawful permanent resident.

PDHRP founder and Director, Daniel Kanstroom notes: "This is an important victory for justice, fairness, and the idea that the rule of law does not end at the border, even for deportees. We hope that it will serve as a precedent and model for many other deportees who have been wrongfully deported."

The PDHRP, based at the Center for Human Rights and International Justice at Boston College, aims to conceptualize a new area of law, providing direct representation to individuals who have been deported and promoting the rights of deportees and their family members through research, legal and policy analysis, media advocacy, training programs, and participatory action research. Our ultimate goal is to introduce legal predictability, proportionality, compassion, and respect for family unity into the deportation laws and policies of this country, and to achieve a just outcome for families like that of Victor, who are now finally together again.

For more information about PDHRP, please visit www.bc.edu/postdeportation.

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Practice Advisory on the Retroactivity of *Padilla* in Massachusetts: *Commonwealth v. Sylvain*, 466 Mass. 422 (2013)

I. Introduction

On September 13, 2013, the Massachusetts Supreme Judicial Court (SJC) held in *Commonwealth v. Sylvain*, 466 Mass. 422 (2013), that the Sixth Amendment duty of defense counsel to accurately advise noncitizen clients of immigration consequences, as announced in *Padilla v. Kentucky*, 559 U.S. 356 (2010), is retroactive under Massachusetts common law for convictions obtained after April 1, 1997. The SJC further found a separate duty to properly advice noncitizen defendants under art. 12 of the Massachusetts Declaration of Rights and found this right also to be retroactive.

Sylvain is the first decision by a state appellate court (and the only one to date) to find *Padilla* retroactive under state law after the U.S. Supreme Court held in *Chaidez v. U.S.*, 133 S.Ct. 1103 (2013), that it is not retroactive under federal law. It is also the first time the SJC has accepted the invitation by the Supreme Court in *Danforth v. Minnesota*, 552 U.S. 264 (2008), to diverge from strict reliance on federal retroactivity law and fashion its own retroactivity formulation under state law when considering the application of federal constitutional rights. This advisory discusses the *Sylvain* decision and its implications both for noncitizen defendants seeking to vacate convictions that unwittingly result in severe immigration consequences and for other defendants who are seeking the application of recent federal constitutional rulings.

II. Retroactivity of *Padilla* prior to the *Sylvain* decision

Padilla was decided by the U.S. Supreme Court on March 31, 2010. Although the decision did not directly address its retroactivity, some courts and constitutional scholars believed that the language of the decision implied that the Supreme Court intended it to apply to convictions obtained prior to 2010. Before the Supreme Court had the opportunity to rule specifically on the issue of *Padilla*'s retroactivity, however, the SJC, in *Commonwealth v. Clarke*, 460 Mass. 30

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(2011), held that *Padilla* was retroactive under federal law to convictions that became final after April 1, 1997.[1]

In *Clarke*, the SJC followed Supreme Court jurisprudence on retroactivity as originally outlined in *Teague v. Lane*, 489 U.S. 288 (1989) and adopted by the SJC in *Commonwealth v. Bray*, 407 Mass. 296, 300-301 (1990). Under *Teague* and *Bray*, a "new rule" may not be applied retroactively to review of final convictions, unless it falls into one of two exceptions (not considered applicable to *Padilla*). 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 *Clarke* decision held that *Padilla* was not a new rule but simply the application of new facts to an established general standard, namely, the standard of ineffective assistance of counsel under the Sixth Amendment as set forth in *Strickland v. Washington*, 466 U.S. 668 (1984).

In February 2013, however, the Supreme Court held in *Chaidez* that *Padilla* was not retroactive under *Teague*, thereby abrogating the SJC's decision in *Clarke* and calling into question the availability of postconviction motions based on *Padilla* for convictions obtained between 1997 and 2010.

III. The Sylvain decision

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 be 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[2], the defendant filed a motion for new trial based on ineffective assistance of counsel under *Padilla*. The trial judge denied the motion and the defendant filed an appeal in the Appeals

[1] This is the effective date of the second of two major immigration bills that were passed in 1996, which greatly expanded the categories of offenses that cause deportability and severely curtailed judicial discretion and forms of relief from removal [the Antiterrorism and Effective Death Penalty Act (AEDPA) went into effect on April 24, 1996, resulting in virtually certain removal for convictions of offenses contained in the greatly expanded category of "aggravated felonies," and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) went into effect on April 1, 1997]. A petition for rehearing filed by the defendant requesting that Padilla be retroactive to April 24, 1996 was denied.

[2] 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.

Court. While his appeal was pending, the Supreme Court issued its decision in *Chaidez* and the defendant filed for direct appellate review which was granted by the SJC.

A. Retroactivity of the Sixth Amendment right under *Padilla*

The SJC began its discussion of retroactivity in *Sylvain* by reviewing its analysis in *Clarke*, in which it relied on the *Teague* framework. "Under *Teague* and its progeny, although 'new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced,'... 'old rule[s] appl[y] both on direct and collateral review.'" A postconviction motion to vacate a plea or motion for new trial under Mass. R. Crim. P. 30 (Rule 30) is considered "collateral review" of a conviction. A Rule 30 motion, therefore, cannot rely on case law decided after the conviction has become final, unless such case law does not announce a "new rule." What constitutes a "new rule" is thus crucial to retroactivity analysis.

Under *Teague*'s original formulation, 489 U.S. at 301, "a case announces a new rule if the result was not dictated by precedent" at the time the defendant's conviction became final. According to the SJC, the Supreme Court has since significantly expanded the definition of a new rule to include decisions not "apparent to all reasonable jurists" at the time the conviction became final. Based on the Supreme Court's permission in *Danforth* for state courts to adopt their own retroactivity rules thereby allowing for greater collateral review of state convictions[3], the SJC held that it will continue to follow only *Teague*'s original formulation as adopted in *Bray*, thus finding a "new rule" only if the result is contrary to precedent.

Using the original *Teague* retroactivity framework, the SJC considered its reasoning in *Clarke* and that of Justice Sotomayor in her dissent in *Chaidez*, along with the lack of Massachusetts precedent contrary to *Padilla*. It also discussed the evolution over the last fifteen years of Massachusetts professional standards requiring defense attorneys to advise noncitizen clients of immigration consequences. This analysis led the Court to hold that *Padilla* was not contrary to Massachusetts precedent and not a "new rule." The Court therefore upheld its ruling in *Clarke* and found that *Padilla* is retroactive to convictions obtained after April 1, 1997.

B. Article 12 right to accurate advice about immigration consequences

While *Padilla* enunciated a right to accurate advice about immigration consequences as part of the Sixth Amendment right to effective assistance of counsel, the SJC had not previously ruled on whether a similar right existed under art. 12 of the Massachusetts Declaration of Rights. The SJC ruled in *Commonwealth v. Marinho*, 464 Mass. 115 (2013), that defense counsel must advice noncitizens of immigration consequences prior to plea or trial and must advocate for a disposition that minimizes immigration consequences when possible, but the Court had not specified the basis of such right. In *Sylvain*, the Court stated unequivocally, "[w]e take the opportunity today to clarify that under art. 12 defense counsel must accurately advise a

[3] The SJC found it unnecessary to consider whether it should adopt its own retroactivity formulation in *Clarke*, since it found *Padilla* to be retroactive under federal law. *Clarke*, 460 Mass. at 35 n.7.

noncitizen client of the deportation consequences of a guilty plea or a conviction at trial." The Court further held that the right under art. 12 is retroactive for the same reasons it had found the Sixth Amendment right to be retroactive. In addition, the Court stated that "tenets of fundamental fairness require that this right apply retroactively." (citing *Commonwealth v. Amirault*, 424 Mass. 618, 639 (1997)).

C. *Ineffective assistance of counsel*

The defendant's motion to vacate his conviction included an affidavit by trial counsel stating that he told the defendant that if the defendant was convicted of simple possession of cocaine and received a sentence of less than one year, this disposition would not likely result in his deportation. The SJC found this advice to be "plainly incorrect" and sufficient to establish deficient performance of trial counsel in satisfaction of the first prong of an ineffective assistance of counsel claim under *Strickland* and *Commonwealth v. Saferian*, 366 Mass. 89, 96 (1974).[4] Although the SJC found the defendant's affidavit to be "highly suggestive that he would have elected to go to trial but for his attorney's erroneous advice," the Court remanded the for the motion judge to make findings on whether the defendant was sufficiently prejudiced by such erroneous advice as to satisfy the second prong of *Strickland* and *Saferian*.

IV. Impact of *Sylvain* for noncitizen defendants

Sylvain allows noncitizen defendants to continue to challenge Massachusetts convictions obtained after April 1, 1997 based on ineffective assistance of counsel under *Padilla*. While the SJC's two prior decisions concerning *Padilla*, *Clarke* and *Marinho*, provide guidance on the contours of *Padilla* claims, i.e., what constitutes deficient performance under the first prong of *Strickland* and *Saferian* and ways for a defendant to establish prejudice under the second prong, *Sylvain* does not expound upon this case law. By creating a separate right under art. 12, however, the SJC leaves open the possibility that it will develop a broader right in future cases under the Massachusetts Declaration of Rights than the one created by *Padilla* under the Sixth Amendment.

V. Impact of *Sylvain* on retroactivity of new constitutional rulings

From 1990, when the Court adopted *Teague* in *Bray*, until the decision in *Sylvain*, the SJC has followed the Supreme Court's interpretation of what constitutes a "new rule" for retroactivity purposes. In *Sylvain*, the SJC held that it will define what constitutes a new rule more narrowly than under Supreme Court jurisprudence, "thereby expand[ing] the availability of remedies for violations of Federal constitutional rights," This may impact at least two cases now pending in the SJC regarding the retroactive application of new constitutional rulings;, *Diatchenko v. D.A. for the Suffolk District*, SJC-11453 (mandatory juvenile life without parole) and *Commonwealth v. Alebord*, SJC-11354 (public trial right during jury selection). If so, the SJC may continue to be in the forefront of providing more expansive constitutional rights to defendants under state law than under federal law.

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[4] *See supra*, n.2.