***[Please note: This is a memorandum by a law student intern. It is intended to jump-start your own research. We have not Shepardized the cases or determined that the student’s analysis of the cases or other sources is correct.]***

**Memorandum**

TO: Appellate Panel Support Unit

FROM: Law Student Intern (EdC)

DATE: August, 2020

RE: Due Process—Failure to Prepare for Trial

**QUESTIONS PRESENTED**

 Can an attorney’s lack of preparation for trial fall under the purview of ineffective assistance of counsel? If yes, when does a failure to prepare for trial count as a violation of due process? What constitutes failure to prepare in Massachusetts?

**BRIEF ANSWERS**

1. Yes, the failure to prepare for trial constitutes ineffective assistance of counsel. Failure to prepare does not depend on the amount of time the defense counsel had to prepare for trial alone.
2. The failure to prepare on the part of the attorney can count as a violation of due process, and several Massachusetts cases provide guidance on the aspects of failure to prepare for trial.

**DISCUSSION**

In general, the right to counsel for indigent parents in Massachusetts termination proceedings is derived from M.G.L. c. 210, §3, and has been identified as a proceduraldue process right under the Fourteenth Amendment and under Article 10 of the Declaration of Rights of the Massachusetts Constitution.[[1]](#footnote-1) *See Adoption of Olivia,* 53 Mass. App. Ct. 674 (2002) (footnote 3). As a result of a parent’s constitutionally protected fundamental interest in his or her child, “an indigent parent is entitled to court-appointed counsel in proceedings that terminate parental rights.” *Olivia,* 53 Mass. App. Ct. at 674 (see *Care and Protection of Stephen,* 401 Mass. 144, 149 (1987)). An indigent parent has a procedural due process right to appointed counsel, but that counsel also must be effective.

Several cases provide that counsel is ineffective if counsel fails to prepare for trial in some manner. *Strickland v. Washington* provides that the “proper standard for attorney performance is that of reasonably effective assistance.” 466 U.S. 668 (1984). The *Strickland* opinion further provides that “[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.” 466 U.S. at 691. The standard of review for finding ineffective assistance of counsel is provided in *Commonwealth v. Saferian*’s two-part test: Upon review, the court shall ask (1) “whether there has been a serious incompetency, inefficiency, or inattention of counsel—behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer—"and; (2) “if that is found, then…whether [counsel’s behavior] has likely deprived the defendant of an otherwise available, substantial ground of defen[s]e.” 366 Mass. 89, 96 (1974). Moreover, “[i]n addition to a showing of incompetence of counsel,” cases usually require a showing “of prejudice resulting therefrom.” *Commonwealth v. Rondeau,* 378 Mass. 408, 412 (1979). The Supreme Judicial Court also held that the two-part *Saferian* test for evaluating the effectiveness of counsel “is an appropriate standard to apply” in care and protection proceedings, just like in termination proceedings. *See In re Georgette,* 439 Mass. 28, 33 (2003); *In re Stephen,* 401 Mass. 144, 149 (1987).

1. **Failure to Prepare for Trial in General**

In *Commonwealth v. Farley,* the defendant was convicted of first-degree murder in Norfolk County, and her subsequent motion for a new trial was denied. 432 Mass. 153 (2000). The defendant appealed and the conviction was reversed; the Supreme Judicial Court of Massachusetts (SJC) held that the defendant was denied effective assistance of counsel at trial because defense counsel failed to investigate an alternate theory, and the defendant is therefore “entitled” to a new trial. *Id.*

 The defendant told authorities that another person had been at the victim’s house, as she had been, the night of the murder. *Farley,* 432 Mass. at 154. The defendant said that the victim and third party had argued, and they were both at the residence when she left. *Id.* Trial counsel learned of this information from the defendant and hired an investigator to track down the third party, Rafael. *Id.* Important on appeal, trial counsel “learned of Rafael’s location several weeks before trial.” *Id.* Despite handing over Rafael’s location to the Commonwealth, trial counsel “failed to interview Rafael at any point before trial” or investigate the alternate lead any further. *Id.* The prosecution was able to call Rafael to their advantage, while defense counsel did not communicate with Rafael or check on his denial of the defendant’s version of events. *Farley,* 432 Mass. at 155.

On appeal, the SJC provided that the defense counsel failed to “develop [its] defense through evidence, cross-examination,” and so on. *Farley*, 432 Mass. at 156. This is distinguished from cases where the “tactical or strategic judgments” used are “called into question; this is a case where defense counsel did not make any of those judgments at all. *Farley*, 432 Mass. at 157. Moreover, “better work might have accomplished something material for the defense” here, and failure to put in that work effectively left the defendant without counsel. *Farley*, 432 Mass. at 156. Reciting evidence is not enough; the defense counsel must “marshal the evidence favorable” to the defendant to create reasonable doubt required in zealous advocacy. Id. The SJC further reasoned that such reasonable doubt would have had a significant impact on jurors, so failing to create that doubt through counsel’s lack of preparation “denied [the defendant] a fair trial.” *Farley*, 432 Mass. at 157.

**II. Where There was No Failure to Prepare or Due Process Violation**

In *Commonwealth v. Alvarez,* a jury in Hampden County convicted the defendant of murder in the second degree and assault and battery by means of a dangerous weapon. 62 Mass. App. Ct. 866 (2005). The defendant appealed, claiming that defense counsel “failed to request a continuance, after making his first appearance on the defendant’s behalf,” leaving only ten days to prepare for the murder trial. *Id.* The appeals court disagreed that this prejudiced the defendant or violated his due process rights; the conviction was affirmed. *Id.*

In advance of trial, the defendant “filed a demand for a speedy trial pursuant to the Interstate Agreement on Detainers, which requires that [the defendant] be brought to trial within 180 days.” *Id.* In concern of the demand for a speedy trial, the State requested a trial date “only ten days after arraignment.” *Id.* Importantly, when the defendant and his counsel appeared at the pretrial conference, “the defendant and his attorney willingly acceded to the trial date requested by the Commonwealth.” *Alvarez,* 62 Mass. App. Ct. at 868. The judge asked the defendant questions about the timing separately and indicated that if there was a request for continuance, it would likely be granted; “[t]he offer was refused” by the defendant. *Id.*

On appeal, the court looked to the standard of review set by *Commonwealth v. Saferian:* In determining whether there was ineffective assistance of counsel, the court will ask “whether there has been serious incompetency, inefficiency, or inattention of counsel—behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer—and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defen[s]e.” 366 Mass. at 96. Moreover, there usually must be a demonstration that prejudice resulted from the assistance of counsel. *Com v. Rondeau,* 378 Mass. at 412. The defendant here was unable to demonstrate that his counsel’s actions led to any prejudice at trial. *Alvarez,* 62 Mass. App. Ct. at 869. Furthermore, the defendant failed to demonstrate “a single instance of how additional time and preparation would have benefitted his cause.” *Id.* Without any affidavits from witnesses, the judge could not determine whether the witnesses’ testimony would have “made a material difference” to the jury if the time and opportunity for these witnesses was available. *Id.* The defendant then argued for a narrow “new rule of law” that would presume prejudice if defense counsel fails to request a continuance “when having only ten days to prepare for a murder trial,” but this argument was also rejected. Not only was defendant unable to show how he was prejudiced, but he had acquiesced to the very time period of preparation he was appealing: “[the defendant's] informed and voluntary agreement to proceed in accordance with trial counsel's recommendation further undermines (although does not preclude) his ability now to claim that counsel was ineffective for pursuing that strategy at trial.” *Alvarez,* 62 Mass. App. Ct. at 873.

As the opinion provided, “[d]eterminations of ineffectiveness should not be made according to a pre-established timeline, but rather on a case-by-case basis.” *Alvarez,* 62 Mass. App. Ct. at 872. The combination of the defendant’s demand for a speedy trial, his responses to questions from the judge, and his denial of a continuance at the pretrial conference led to the appeals court ruling. The period of time between the first appearance and trial did not constitute ineffective assistance of counsel due to a failure to prepare for trial; the defendant’s due process rights were not denied.

**III. Failure to Review and Subpoena Records**

In *Commonwealth v. Ly,* a jury in Bristol County convicted the defendant of “indecent assault and battery” on a “person over age 14.” 454 Mass. 223 (2009). The defendant made a motion for a new trial on the allegation of ineffective assistance of counsel, but this motion was denied. *Id.* The defendant appealed the denial and the Appeals Court transferred the case to the SJC. *Id.* The SJC reversed the conviction and remanded, finding that “counsel was ineffective in failing to subpoena the defendant’s or complainant’s telephone records.” *Id.*

Factually, the defendant’s “charges arose out of a sexual encounter between the defendant and a female friend” (complainant). *Ly,* 454 Mass. at 224. The defendant claimed the sex was consensual. *Id.* The defendant appealed on several grounds, one being relevant to this memorandum; the defendant argued that his counsel was ineffective because his counsel “fail[ed] to subpoena the complainant's telephone records to impeach her testimony” claiming she “had not made telephone calls to the defendant after the sexual encounter…” *Ly,* 454 Mass. at 225. The court agreed with the defendant, because the “only issue in the case was consent” and which story to accept; the phone records would have been relevant to show the defendant’s credibility or lack thereof. *Ly,* 454 Mass. at 229.

Because of the significance of the phone records, the court said that there was “no excuse” for not procuring them: “The centrality of the telephone calls to the only issue in the case is apparent, and should have been apparent to trial counsel before the case began.” *Ly,* 454 Mass. at 230.

**IV. Failure to Interview Witness Before the Witness Testifies at Trial**

In *Commonwealth v. Gonzalez,* the defendant was convicted of first-degree murder in Hampden County. 473 Mass. 415 (2015). The defendant appealed his conviction, arguing that he deserved a new trial because he did not receive effective assistance of counsel. *Gonzalez,* 473 Mass. at 416. In relevant part, the defendant made this claim because his trial counsel failed to interview a contradictory alibi witness prior to giving testimony in court. *Id.* The court rejected the defendant’s arguments, and the conviction was affirmed. *Id.*

At trial, the defense called Carol Adorno to testify in support of the alibi for defendant. *Gonzalez,* 473 Mass. at 419. When the defendant testified, he offered a contradictory alibi. In a post-trial affidavit, Adorno “attested that she was not interviewed by trial counsel before she testified.” *Gonzalez,* 473 Mass. at 420. Moreover, the defendant claimed that there were two witnesses “who would have offered new evidence regarding the immediate aftermath of the shooting,” but they were not called. *Id.*

In its decision, the SJC agreed “that defense counsel erred in calling Adorno to testify as an alibi witness without knowing what she would say.” *Gonzalez,* 473 Mass. at 421. However, the SJC next considered “whether the credibility of the defendant’s testimony would have been materially stronger had defense counsel interviewed Adorno before trial and decided to forgo offering her testimony.” *Id.* The Court concluded that “although Adorno’s contradictory alibi testimony likely diminished the credibility of the defendant’s alibi,” it is unlikely that Adorno’s testimony influenced the jury’s verdict either way. *Gonzalez,* 473 Mass. at 422. Because the Commonwealth had an abundance of strong evidence against the defendant, the outcome of conviction would likely have been the same, even if Adorno had not testified: “[t]he defendant’s testimony, had it stood alone, was not likely to have been regarded as sufficiently credible to create a reasonable doubt regarding the defendant’s guilt.” *Gonzalez,* 473 Mass. at 422-423. The SJC used the evidence and facts on record to make the argument that the reasonable minds of the jury would not have been swayed, and that the error was not material enough to deem the trial counsel ineffective. *Id.* Additionally, the defendant argued that “the failure of the trial judge to instruct the jury regarding an alibi defense *sua sponte* resulted in a substantial likelihood of a miscarriage of justice.” *Gonzalez,* 473 Mass. at 425. The SJC disagreed, answering “it is well settled that an ‘alibi instruction is not required where the charge as a whole makes clear that the Commonwealth must prove beyond a reasonable doubt that the defendant committed the crime for which he was indicted.’” *Id.*

**CONCLUSION**

 The Supreme Court offered basic guidance in *Strickland* and *Saferian.* Other cases hold that in situations requiring appointment of counsel for indigent defendants, due process requires that “the assignment of defense counsel must be…made in a manner that affords effective aid in the preparation and trial of the case.” *See* [*Powell v. Alabama*, 287 U.S. 45, 71–72 (1932)](http://cdn.loc.gov/service/ll/usrep/usrep287/usrep287045/usrep287045.pdf); [*Glasser v. United States*, 315 U.S. 60, 70 (1942)](http://cdn.loc.gov/service/ll/usrep/usrep315/usrep315060/usrep315060.pdf). To serve the principles of due process, an attorney should offer reasonably effective assistance to his or her clients. Upon review, a court will ask whether there has been a serious incompetency, inefficiency, or inattention of counsel, where the behavior of counsel falls measurably below that which might be expected from an ordinary fallible lawyer. If this is the case, a reviewing court will ask whether the assistance likely deprived the defendant of an otherwise available, substantial ground of defense.

 *Alvarez* demonstrated an instance where the court addressed whether ineffective assistance to counsel violated a person’s due process. 62 Mass. App. Ct. at 872. A relatively short amount of time to prepare for a trial is insufficient, on its own, to count as failure to prepare for trial. An attorney not insisting on a continuance for trial when having a short amount of time to prepare is not, by itself, grounds for a reversal. Courts will consider whether an attorney consults with his or her client and the whether the litigation strategy is informed. Agreement to the very strategy being used as grounds for an appeal will make it less likely the appellant will prevail. Determinations of ineffectiveness shall not be made according to a pre-established timeline, but rather on a case-by-case basis.

As demonstrated in the *Gonzalez* case, an error by counsel (even if professionally unreasonable) does not warrant setting aside the judgment of a criminal proceeding if the error *had no effect* on the judgment. 473 Mass. at 422. To have standing for a favorable appeal, actual prejudice must have resulted from the error.

If evidence speaks to the “only issue in the case” or is central to the case, there is a chance that counsel’s failure to pursue that evidence will render them ineffective. *Ly,* 454 Mass. at 230. For example, the phone records in *Ly* were central to the issue at trial; a zealous advocate would not have failed to procure those records. *Id.*

Counsel’s lack of preparation (i.e. not pursuing an obvious lead) can effectively leave the defendant without counsel, no better off than if they appeared *pro se. Farley*, 432 Mass. at 156. Such a lack of preparation has the danger to deny the client a fair trial. *Farley*, 432 Mass. at 157.

1. In pertinent part, the Massachusetts Declaration of Rights of the Massachusetts Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” Mass. Declaration of Rights, Art. 10 (ratified October 25, 1780). Article 10 has been labeled as “a primary source of due process jurisprudence in Massachusetts. [This includes] substantive due…[or] procedural due process [which] refers to the constitutional requirement that governmental action be implemented in a fair manner…” Lawrence Friedman and Lynnea Thody, *The Massachusetts State Constitution,* Oxford University Press, p. 50-51 (2011). [↑](#footnote-ref-1)