

Case Focus

Commonwealth v. Clarke: *Padilla* Ruled Retroactive in Massachusetts

By Jesse M. Boodoo

Nearly two years since its release, the United States Supreme Court's decision in *Padilla v. Kentucky*, ___ U.S. ___, 130 S. Ct. 1473 (2010), continues to generate interest in the increasingly intersecting worlds of criminal and immigration law. The landmark case established that an attorney provides ineffective assistance of counsel when she fails to inform a noncitizen client that a guilty plea carries a risk of deportation. While the prospective impact of *Padilla* was clear from day one, the retrospective effect was initially more difficult to gauge. Prior to the decision, virtually no jurisdiction held defense counsel ineffective for failing to warn a client about the deportation consequences of a plea. Could *Padilla* then really be used to attack past pleas negotiated under this widely-accepted and longstanding view of the law? The Supreme Court did not address whether *Padilla* should apply retroactively to pleas predating the decision, leaving lower courts to consider that question on their own as they faced a wave of post-conviction *Padilla* claims.

In *Commonwealth v. Clarke*, 460 Mass. 30 (2011), the Supreme Judicial Court offered the first Massachusetts appellate guidance on *Padilla*, and became the first high court in the country to hold that *Padilla* should be applied retroactively. On the facts before it, however, the SJC concluded that the



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defendant had failed to make a sufficient showing of prejudice to warrant a new trial. *Clarke* has attracted much attention since its release, serving as both a flashpoint in the ongoing debate over *Padilla*'s meaning and a crucial guide for practitioners litigating their own *Padilla* claims.

The events leading to the decision in *Clarke* began with the defendant pleading guilty, in 2005, to possession of a class B substance (crack cocaine) with intent to distribute. In 2009, the Department of Homeland Security notified the defendant that he was subject to deportation because of his conviction. This eventually prompted the defendant to file a motion for new trial based on *Padilla*. The defendant's plea counsel submitted an affidavit averring that she had been unaware that the defendant was not a citizen, and that she had no memory of discussing any immigration consequences of the plea. The defendant submitted his own affidavit stating that he was never told that his plea could result in deportation. A Superior Court judge denied the motion, and the SJC on its own initiative transferred the appeal to itself.

In an exhaustively researched opinion, the SJC took up the question of *Padilla*'s retroactivity, an issue causing a deep split in courts across the country. Massachusetts, like most states, follows the federal framework for determining whether new constitutional rules are to be applied retroactively. Under that framework, an "old rule" — a rule dictated by established precedent — applies retroactively, but a "new rule" — a rule that imposes new obligations — applies only to pending cases. The SJC reasoned that *Padilla*, while novel in a sense, was ultimately an application of well-established principles regarding the effective assistance of counsel to new facts — in essence, an "old rule" in new garb. The SJC therefore held that *Padilla* should apply retroactively to guilty pleas entered after April 1, 1997, the point at which (according to the *Padilla* opinion) deportation became, as a matter of federal law, "intimately related to the criminal process" and "nearly an automatic result for a broad class of noncitizen offenders."

That said, the SJC concluded that, given the facts of the case, the defendant in *Clarke* was not entitled to a new trial. To prevail on his claim, the defendant needed to show both his counsel's ineffectiveness and resultant prejudice. In a key passage for those dealing with their own *Padilla* claims, the

SJC offered a detailed description of the minimum showing required to satisfy the prejudice requirement: the defendant must (1) aver that “but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial”; and (2) prove “that a decision to reject the plea bargain would have been rational under the circumstances” by showing either (a) that there was a defense that he could have pursued; (b) that counsel could have negotiated a plea to different charges without deportation consequences; or (c) the presence of “special circumstances” indicating that the defendant would have placed particular emphasis on the potential for deportation in deciding whether to plead guilty. The defendant in *Clarke* fell short on both prongs, failing to aver that he would have insisted on going to trial, and failing to offer any non-speculative reason why he would have rationally gone to trial, given the overwhelming evidence against him.

Easy to miss in the SJC’s analysis is a critical footnote, at the end of the decision, addressing the significance of the statutory deportation warning provided by judges, G. L. c. 278, § 29D, and the “green sheet” plea form ordinarily bearing the defendant’s signed certification that he understands (among other things) the possibility of deportation resulting from a plea. In a number of early cases out of the District and Superior Courts, the Commonwealth successfully argued that the statutory warning and signed green sheet conclusively precluded a finding of prejudice. The SJC rejected that argument, reasoning that, while the green sheet and statutory warnings are relevant to the prejudice analysis, they are not “an adequate substitute for defense counsel’s professional obligation to advise her client of the likelihood of specific and dire immigration consequences.”

Since the decision in *Clarke*, a substantial number of other courts have weighed in on the question of *Padilla*’s retroactivity, many expressly adopting or criticizing the SJC’s reasoning. Conflicting decisions out of the Federal appeals courts (for example, the Third Circuit (finding *Padilla* retroactive) and the Seventh and Tenth Circuits (finding *Padilla* non-retroactive)) may lead to a definitive ruling from the Supreme Court in the near future. But for now, at least, for noncitizens who pled guilty without being advised of the potential deportation consequences, *Clarke* opens a critical avenue for vacating pleas and potentially forestalling deportation. ■