COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT
NO. 2020-P-0075

ESSEX, SS.

COMMONWEALTH,
Appellee,

V.

BYRON SOLIS,
Appellant

ON APPEAL FROM THE ORDERS OF
THE LAWRENCE DISTRICT COURT

BRIEF FOR APPELLANT

FOR THE APPELLANT:

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APRIL 6, 2020

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I. Whether the motion judge erred in denying Defendant's Second Motion to Vacate Admission to Sufficient Facts where plea counsel failed to file a likely meritorious motion to dismiss the complaint;

II. Whether the motion judge erred in denying Defendant's Second Motion to Vacate Admission to Sufficient Facts where plea counsel failed to file a likely meritorious motion to suppress evidence based on an illegal, warrantless entry into the Defendant's home, not subject to any exception to the warrant requirement;

III. Whether the motion judge erred in denying Defendant's Second Motion to Vacate Admission to Sufficient Facts where plea counsel did not correctly advise the Defendant of the immigration consequences of his pleas, and where the Defendant was prejudiced by this failure.

STATEMENT OF THE CASE

Bayron[1] Solis ("the Defendant") appeals the November 14, 2019, denial of his Second Motion to Vacate Admission to Sufficient Facts. On March 19, 2001, the Defendant was charged in the Lawrence District Court with a complaint alleging Disturbing the Peace, in accordance with G. L. c. 272, § 53, and Malicious Destruction of Property Over $250, in

[1] The complaint spells the Defendant's name "Byron Solis." His name is correctly spelled "Bayron Solis."

accordance with G. L. c. 266, § 127 (Docket No. 0118CR1495). R.A. 3-5.[2]

On August 21, 2001, the Defendant admitted to sufficient facts on both counts. R.A. 4, 66-67. The Court (Hogan, J.) continued the case without a finding for one year, and ordered unsupervised probation, a $35 victim witness fee, and, if there was no restitution, then court costs of $200. R.A. 4-5, 67. The case was dismissed after the Defendant's successful completion of probation. R.A. 4.

On January 4, 2017, the Defendant filed a Motion to Vacate Conviction, asserting that his plea counsel rendered ineffective assistance by failing to correctly advise him of the immigration consequences of his plea. R.A. 69-85. On January 9, 2017, the District Court (Hogan, J.) denied the motion without a hearing. R.A. 108. The Defendant filed a timely notice of appeal, and the Appeals Court affirmed the denial of the Defendant's motion by a Rule 1:28 Order on February 12, 2018 (2017-P-0231). R.A. 114-118; Commonwealth v. Solis, 92 Mass. App. Ct. 1127 (2018) (unpublished).

[2] The Defendant cites to the record appendix as "R.A. [page]."

Represented by new counsel, on November 8, 2019, the Defendant filed his Second Motion to Vacate Admission to Sufficient Facts.[3] R.A. 6, 10-136. On November 14, 2019, the Motion was denied by margin notation. R.A. 137. The Defendant filed a timely notice of appeal, R.A. 141, and the case was docketed in the Appeals Court on January 16, 2020. R.A. 7.

STATEMENT OF FACTS

I. Defendant's Background

At the time of his plea, the Defendant was in his early twenties, was responsible for his family's hopes and futures, and struggled with the English language and with alcoholism. R.A. 75-76, 125-129. The Defendant was raised in a small mountain village in Guatemala with his five siblings. R.A. 124. A sixth sibling, Elmer, died at age three because his mother could not afford to bring him to the doctor. R.A. 124. The Defendant was raised in such poverty that he slept in the same room as his siblings and shared a bed with his two younger siblings. R.A. 124.

[3] The motion could alternatively be viewed as a motion to reconsider the previous motion to vacate. R.A. 11.

The Defendant's father left the family when the Defendant was young, worsening the financial struggles the family faced. R.A. 124. When he was twelve, the Defendant watched helplessly as three men murdered his father. R.A. 124.

The Defendant attended school only up to the third grade. R.A. 125. School was very expensive, so the Defendant dropped out so that the money could be used to educate his siblings, and so that he could help his mother at work. R.A. 124. He also got a job planting corn. R.A. 124.

At age 14, the Defendant left home and moved to the capital city to find a better paying job so that he could help provide for his mother and younger siblings. R.A. 125. He found work as a concrete worker's apprentice assembling wooden pallets, and earned 350 quetzales (approximately $50 USD) every fifteen days. R.A. 125. There was never enough money. R.A. 125.

Further, the cities of Guatemala, including the capital, where the Defendant was living, were plagued by ruthless and violent gangs, most famously MS-13. R.A. 125. Young men were hunted, threatened, and forced to join the gangs. R.A. 125. Those who refused

were often killed. R.A. 125. The Defendant was the victim of an armed robbery carried out by three gang members, who threatened him with a knife and a gun. R.A. 125. He was afraid that worse violence would befall him in the city. R.A. 125.

The Defendant knew his only chance to make enough money and to escape the violence would be to leave Guatemala. R.A. 125. His mother mortgaged her land, about 0.01 acres, to pay the 10,000 quetzales for a coyote to help the Defendant cross the border. R.A. 125. He arrived in the United States after about a month, and entered without inspection. R.A. 126. He settled in Lawrence. R.A. 126.

The Defendant soon got a job loading trucks at the Sterilite factory, earning more in a month than he could in a year in Guatemala. R.A. 126. He was offered a permanent job at Sterilite, but he could not accept it because he did not have documentation. R.A. 126. He found work landscaping, which he has been doing for almost twenty years. R.A. 126.

The Defendant was thrilled to be able to help support his family back in Guatemala, and both of his younger siblings graduated from high school. R.A. 126. His younger sister continued her education further and

is studying to be a nurse. R.A. 126. The Defendant was also able to pay his mother back to clear the mortgage on her land, and helped her rebuild her house after it was partially destroyed in an earthquake. R.A. 126. He sends money to his siblings back in Guatemala, so that their children can afford clothing and school supplies, and so that his sister has potable water in her home. R.A. 126-127.

Beyond the financial improvements living in the U.S. has brought, the Defendant also appreciates the feeling of safety he has here, instead of having to look over his shoulder to see if any gang members are intent on hurting him. R.A. 126.

The Defendant has been married for five years; he and his wife, Juana, have been together for about sixteen years. R.A. 127. They have a 12-year-old son, and together are raising Juana's 17-year-old daughter from a previous relationship. R.A. 127.

II. Facts of the Case

According to the Lawrence Police report submitted in support of the Defendant's Second Motion to Vacate Admission to Sufficient Facts, on March 16, 2001, police were dispatched to 20 Butler Street for a disturbance. R.A. 63. The owner of the home, Diego

Batista, reported that, about five minutes prior, the first-floor tenants were inside the apartment "drinking, yelling and throwing empty beer bottles out the window." R.A. 63-64. Police entered the first-floor apartment, where Abraham Popjoy and the Defendant denied throwing any bottles. R.A. 64. Police saw three broken Formosa brand beer bottles on the ground outside of the house. R.A. 64. Police also saw a motor vehicle parked outside with a smashed windshield. R.A. 64. Both Popjoy and the Defendant again denied involvement. R.A. 64. Police saw empty Formosa beer bottles in the apartment, so Popjoy and the Defendant were arrested. R.A. 64.

Popjoy had argued with a neighbor about a woman, and wanted to get revenge. R.A. 127. He did so by throwing bottles at the neighbor's car. R.A. 127. Popjoy had boasted that he had killed his stepfather with a machete in Guatemala, so when Popjoy told the Defendant not to tell police what happened, the Defendant obliged. R.A. 127.

The Defendant was charged with, and ultimately admitted to sufficient facts for, malicious destruction of property over $250 and disturbing the peace. R.A. 4, 66. On December 9, 2015, the

Department of Homeland Security served the Defendant with notice of removal proceedings against him, on the grounds that he was present in the U.S. without being admitted or paroled. R.A. 100-101. Had the Defendant not had this matter on his record, he would have been eligible to petition for Cancellation of Removal. R.A. 132. With the instant conviction for a crime involving moral turpitude, the Defendant was unable to apply for Cancellation of Removal and thus had no defense to the removal proceedings. R.A. 132.

III. First Motion to Vacate Plea

The Defendant moved to vacate his conviction on January 4, 2017. R.A. 5. He was represented by attorney Rhonda Selwyn Lee, who submitted affidavits from the Defendant and plea counsel, Attorney Murphy, outlining the advice plea counsel provided. R.A. 69-85. Plea counsel had no specific memory of the case, but recalled that his usual practice at the time of the Defendant's plea was to read the language of the green sheet to the client. R.A. 74. The Defendant did not recall receiving any immigration-related advice from counsel. R.A. 76. He would have remembered discussing the topic with his attorney, as he was

afraid of Immigration, and so any mention of immigration would have stood out to him. R.A. 76.

The Defendant argued that his plea counsel violated the dictates of Padilla and Commonwealth v. Clarke by failing to give him correct and detailed advice regarding the immigration consequences of his plea. R.A. 72-73. The Defendant further argued that he was prejudiced by this failure because (1) he had an available substantial ground of defense – that he lacked the specific intent necessary for the charge of malicious destruction of property because he was intoxicated at the time; and (2) he could have attempted to negotiate a different plea, where the malicious destruction charge would be dismissed and the Defendant could be ordered to alcohol treatment on the disturbing the peace charge. R.A. 73.

Judge Hogan denied the Motion, ruling that the Defendant failed to establish that his conviction created clear immigration consequences,[4] and, where his Notice to Appear charged only unlawful presence, "he

[4] The District Court adopted the Commonwealth's proposed findings of fact and rulings of law verbatim, something this Court has often criticized. However, this Court found that it is not necessarily error to do so, and the findings were supported by the record. Solis, 92 Mass. App. Ct. 1127 at *2 n.5.

is not facing deportation for this admission at all." R.A. 108, 111. Judge Hogan next found that the Defendant failed to demonstrate prejudice, as his voluntary intoxication theory was not a substantial ground of defense, the Defendant received a favorable disposition, there was no evidence that the prosecutor would have agreed to the Defendant's suggested disposition, and the Defendant had not set forth any special circumstances. R.A. 111-112.

The Appeals Court affirmed in a 1:28 decision, finding no abuse of discretion in the motion judge's determination that the Defendant had not demonstrated prejudice. R.A. 114-118; Commonwealth v. Solis, 92 Mass. App. Ct. 1127 (2018) (unpublished). The Appeals Court did not reach the issue of whether plea counsel's performance had been deficient. R.A. 116; Solis, 92 Mass. App. Ct. at *2.

IV. Second Motion to Vacate Plea

Represented by current counsel, the Defendant filed his Second Motion to Vacate Admission to Sufficient Facts. R.A. 10-136. Defendant argued that plea counsel was ineffective for failing to file a motion to dismiss or a motion to suppress evidence, both of which were likely meritorious and would have

been determinative of the case. R.A. 25-36. He further argued that the conviction had resulted in immigration consequences to the Defendant, as he was no longer eligible to seek cancellation of removal due to his plea in this matter. R.A. 36-47. Mr. Murphy's failure to advise the Defendant about cancellation of removal, and failure to seek a plea that did not result in this consequence, was ineffective. R.A. 36-47. His review of the green sheet language with the Defendant was insufficient. R.A. 45-46.

The Defendant further argued that, had he known of the immigration consequences the plea would cause, he would have insisted on proceeding to trial. R.A. 50-56. He had a substantial ground of defense, including two potentially determinative pretrial motions that were never filed, and a different plea could have been negotiated. R.A. 51-54. Finally, the Defendant had special circumstances that would have supported his decision to reject the plea, specifically that he was supporting his mother and siblings financially, and that they relied on his remaining in the United States. R.A. 54-56. He was threatened by gang members and robbed at gunpoint in his home country, and it was dangerous for him to

continue to work in the city centers of Guatemala. R.A. 55, 125. The Defendant's mother mortgaged her home so that her son could come to America for greater opportunities, despite his lack of formal education. R.A. 55, 125. He and his family relied on his staying and working in the United States. R.A. 55-56, 125-129.

The Defendant's motion was denied by margin notation reading, "Upon review of the additional information, the original decision stands. MOTION DENIED. J. Hogan." R.A. 137.

SUMMARY OF ARGUMENT

The motion judge erred in denying the Defendant's Second Motion to Vacate Admission to Sufficient Facts, as plea counsel failed to file two likely meritorious pretrial motions that would have been determinative, and because he failed to adequately inform the Defendant of the immigration consequences of his plea. This plea rendered the Defendant subject to deportation without any available defense.

In Argument II, *infra*, at pp. 23 to 28, the Defendant argues that the motion judge erred in denying his motion to vacate his admission to sufficient facts because his attorney failed to file a motion to dismiss the malicious destruction of

property charge despite there being insufficient evidence of each of the four essential elements. The police report did not establish probable cause to believe that the Defendant had been involved in the incident, that the property damage was inflicted wilfully or maliciously (as opposed to carelessly), or that the damaged windshield would cost over $250 to repair.

In Argument III, *infra*, at pp. 28 to 34, the Defendant argues that the motion judge erred in denying his motion to vacate his plea because his attorney failed to file a motion to suppress evidence where police entered his home without a warrant, not subject to any exception to the warrant requirement. The entry was not based on consent, the need to render emergency aid, or probable cause and exigent circumstances, and thus a motion to suppress would have been allowed. The Commonwealth's case would have been substantially weakened without the officers' observations from inside the home.

In Argument IV, *infra*, at pp. 34 to 53, the Defendant argues that he was deprived of his Sixth Amendment and Article 12 rights to the effective assistance of counsel where the only advice his plea

counsel provided regarding the immigration consequences of his plea was to read the warning on the green sheet. The Defendant admitted to sufficient facts for malicious destruction of property over $250, a crime involving moral turpitude. Plea counsel did not inform the Defendant that the plea would make cancellation of removal unavailable to him in the future. The Defendant was prejudiced by plea counsel's deficient advice, as he had a substantial ground of defense to the charges, there was a reasonable possibility that a different plea agreement could have been negotiated, and special circumstances exist showing that the Defendant would have placed a strong emphasis on immigration consequences in deciding whether to plead guilty. An examination of all of these factors supports the conclusion that, under the circumstances, a reasonable person would have gone to trial if given constitutionally effective advice about the immigration consequences of his plea.

ARGUMENT

I. STANDARD OF REVIEW

"A motion to withdraw a guilty plea is treated as a motion for a new trial." Commonwealth v. Henry, 88 Mass. App. Ct. 446, 451 (2015) (quoting Commonwealth

v. DeJesus, 468 Mass. 174, 178 (2014)). This Court reviews the denial of such motions "to determine whether there has been a significant error of law or other abuse of discretion." Commonwealth v. Cano, 87 Mass. App. Ct. 238, 240 (2015) (quoting Commonwealth v. Grace, 397 Mass. 303, 307 (1986)). A judge may grant such a motion "if it appears that justice may not have been done." Henry, 88 Mass. App. Ct. at 451; Mass. R. Crim. P. 30(b). "Justice is not done if the defendant has received ineffective assistance of counsel in deciding to plead guilty." Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 394 (2012) (citing Commonwealth v. Hiskin, 68 Mass. App. Ct. 633, 637-638 (2007)).

Though appellate courts "grant substantial deference" to a decision on a motion under Rule 30(b) where the motion judge was also the plea judge, Commonwealth v. Grant, 426 Mass. 667, 672 (1998), "[w]hen a new trial claim is constitutionally based, . . . 'this court will exercise its own judgment on the ultimate factual as well as legal conclusions.'" Commonwealth v. Adkinson, 80 Mass. App. Ct. 570, 584-585 (2011) (quoting Commonwealth v. Healy, 438 Mass. 672, 678 (2003)).

A defendant is entitled to the effective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution and Article 12 of the Massachusetts Declaration of Rights. In order to prevail on an ineffectiveness claim, the defendant must show "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 defence." Commonwealth v. Clarke, 460 Mass. 30, 45 (2011) (quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974)). If the Saferian standard is met, the Federal test is also satisfied. Id.

II. THE MOTION JUDGE ERRED IN DENYING DEFENDANT'S SECOND MOTION TO VACATE HIS ADMISSION TO SUFFICIENT FACTS, AS PLEA COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO MOVE TO DISMISS THE COMPLAINT.

Where an ineffective assistance claim is based on a failure to file a motion to dismiss, this requires the Court to determine whether such a motion would have been allowed. Commonwealth v. Ortiz, 53 Mass. App. Ct. 168, 173-174 (2001), rev. denied, 435 Mass.

1108 (2002). A complaint application which fails to establish probable cause for each element of the offense must be dismissed. E.g., Commonwealth v. Humberto H., 466 Mass. 562, 565-566 (2013). Probable cause requires "more than a suspicion of criminal involvement, something definite and substantial. . ." Commonwealth v. Santaliz, 413 Mass. 238, 241 (1992) (quoting Commonwealth v. Rivera, 27 Mass. App. Ct. 41, 45 (1989)). A hunch is not sufficient. Commonwealth v. Patti, 31 Mass. App. Ct. 440, 442 (1991), rev. denied, 411 Mass. 1105 (1991) (reasonable suspicion requires more than a good faith hunch).

Here, to sustain the complaint, there must have been probable cause in the application to establish that: "the defendant injured or destroyed the personal property, or dwelling house or building of another; the defendant did so wilfully; the defendant did so with malice; [and] the value of the property so injured or destroyed exceeded $250." Commonwealth v. Deberry, 441 Mass. 211, 215 n.7 (2004) (citing Instruction 5.301 of the Model Jury Instruction for Use in the District Court (1995)). None of these elements are present here.

First, the evidence that the Defendant was involved in any misconduct fell short of probable cause. The only identification was the landlord's report that, about five minutes before police arrived, "the gentlemen who rent the first [floor] were inside the [apartment] drinking, yelling and throwing empty beer bottles out the window." R.A. 63-64. Police found both Abraham Popjoy and the Defendant within the first-floor apartment; both denied throwing any bottles. R.A. 64.

The landlord's report that it was the first-floor tenants who were misbehaving does not establish probable cause to believe that the Defendant was involved in the incident. It is likely that the landlord was simply directing the police to where the bottles originated from, not identifying those involved. The landlord did not identify the Defendant as a tenant. Rather, it appears officers simply assumed he was because he happened to be present in the apartment when they arrived. That the Defendant was present on the first floor when police arrived five minutes later is insufficient to establish probable cause to believe he was involved in any alleged crime. "[M]ere presence at the commission of

the wrongful act and even failure to take affirmative steps to prevent it do not render a person liable as a participant." Commonwealth v. McCarthy, 385 Mass. 160, 163-164 (1982) (quoting Commonwealth v. Benders, 361 Mass. 704, 708 (1972)).

Second, to be "wilful," the Defendant must have "intended both the conduct and its harmful consequences." Commonwealth v. Redmond, 53 Mass. App. Ct. 1, 4 n.2, rev. denied, 435 Mass. 1107 (2001). "The word 'wilful' means intentional and by design in contrast to that which is thoughtless or accidental." Commonwealth v. Gordon, 82 Mass. App. Ct. 227, 229, rev. denied, 463 Mass. 1107 (2012). The police report provides no basis to conclude that the car windshield was broken intentionally or by design.

It appears from the police report that the car was not visible from within the apartment, as Officer Panagiotakos had to leave the apartment to see the car parked under the apartment window. R.A. 64. There was no evidence that the car was damaged willfully or intentionally, rather than incidentally when someone drunkenly tossed a beer bottle out the apartment window.

Third, the malice requirement demands "a showing that the defendant's conduct was 'motivated by cruelty, hostility or revenge.'" Commonwealth v. Armand, 411 Mass. 167, 170 (1991) (quoting Commonwealth v. Schuchardt, 408 Mass. 347, 352 (1990)). "[T]he wilful commission of an unlawful or even destructive act does not, by itself, suffice to prove malice under G. L. c. 266, § 127." Commonwealth v. Woods, 94 Mass. App. Ct. 761, 769, rev. denied, 481 Mass. 1108 (2019). An act causing damage to property that is done "with a spirit of indifference or recklessness, perhaps even arrogance and insolence," is wanton destruction of property, Commonwealth v. Ruddock, 25 Mass. App. Ct. 508, 512-513 (1988), which is not a lesser included offense of malicious destruction of property. Redmond, 53 Mass. App. Ct. at 5. The police report establishes, at best, wanton destruction of property. There are no grounds whatsoever from which to infer that the windshield was broken intentionally, motivated by animus or hostility.

Finally, there was insufficient evidence to determine that the element requiring a $250 loss was met. "Where repairable damage or destruction is

caused to a portion or portions of a greater whole, the value of the property damaged or destroyed is to be measured by the reasonable cost of the repairs necessitated by the malicious conduct." Deberry, 441 Mass. at 221-222 (quoting Nichols v. United States, 343 A.2d 336, 342 (D.C. 1975)). The police report presented no evidence regarding the cost of repairing the windshield of a twelve-year-old Honda Accord. R.A. 63-64. As such, there was no probable cause to support the fourth element of the malicious destruction of property charge.

Because there was insufficient proof of each of the four elements of malicious destruction of property over $250, plea counsel provided ineffective assistance in failing to move to dismiss the complaint. The motion judge erred in denying the Defendant's Second Motion to Vacate Admission to Sufficient Facts on this basis.

III. THE MOTION JUDGE ERRED IN DENYING DEFENDANT'S SECOND MOTION TO VACATE HIS ADMISSION TO SUFFICIENT FACTS, AS PLEA COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO MOVE TO SUPPRESS EVIDENCE.

"The failure of counsel to litigate a *viable* claim of an illegal search and seizure is a denial of the defendant's Federal and State constitutional right

to the effective assistance of counsel." Commonwealth v. Pena, 31 Mass. App. Ct. 201, 204 (1991) (emphasis in original). To show that counsel was ineffective in failing to file a motion to suppress, "the defendant must show that the motion to suppress would have presented a viable claim and that 'there was a reasonable possibility that the verdict would have been different without the excludable evidence.'" Commonwealth v. Segovia, 53 Mass. App. Ct. 184, 190 (2001) (quoting Pena, 31 Mass. App. Ct. at 205). If the defendant has made such a showing, the burden shifts to the Commonwealth to show the admission of the evidence was harmless beyond a reasonable doubt. Id.

A. A Motion to Suppress Would Have Succeeded, As Police Entered The Defendant's Home Without a Warrant, Probable Cause, Consent, or a Need for Emergency Aid.

Here, officers entered the first-floor apartment without consent or probable cause and exigent circumstances. Pursuant to the Fourth Amendment and article 14, the police may not enter a home without a warrant "unless they act on the basis of (1) voluntary consent, (2) probable cause and exigent circumstances, or (3) an objectively reasonable belief

that there is an injured person or a person in imminent danger of physical harm inside the home who requires immediate assistance." Commonwealth v. Suters, 90 Mass. App. Ct. 449, 452 (2016) (internal citations and footnotes omitted). "[A] warrantless entry into a home constitutes a search in the constitutional sense[.]" Commonwealth v. Lopez, 458 Mass. 383, 394 (2010). The Commonwealth bears the burden of showing that a warrantless entry "fell within the narrow, jealously guarded exceptions to the general rule." Commonwealth v. Kiser, 48 Mass. App. Ct. 647, 648 (2000). These exceptions do not apply here.

Exigent circumstances require that officers have "reasonable grounds to believe that obtaining a warrant would be impracticable under the circumstances[,]" either because the delay would "create 'a significant risk' that 'the suspect may flee,' 'evidence may be destroyed,' or 'the safety of the police or others may be endangered.'" Commonwealth v. Arias, 481 Mass. 604, 616 (2019) (quoting Commonwealth v. Figueroa, 468 Mass. 204, 213 (2014)). "The investigation of a crime, even a serious crime . . . , does not itself establish an exigency."

Id. at 617. There were no indications of exigency to excuse a warrantless and nonconsensual entry into a home in this case.

Similarly, the entry was not based on consent. To show a consent entry, "the Commonwealth must show 'consent unfettered by coercion, express or implied, and also something more than mere acquiescence to a claim of lawful authority.'" Commonwealth v. Rogers, 444 Mass. 234, 237 (2005) (quoting Commonwealth v. Voisine, 414 Mass. 772, 783 (1993)). "In meeting its burden of establishing voluntary consent to enter, the Commonwealth must provide us with more than an ambiguous set of facts that leaves us guessing about the meaning of this interaction and, ultimately, the occupant's words or actions." Id. at 238.

The police report does not contain any indicia of consent, stating only that "At that time Officers ... arrived on scene and we entered the first fl. apt. Were met by Suspect (1) Abraham Popjoy. . ." R.A. 64. Stated simply, if police obtained consent to enter, the reasonable and natural place to document that would be in the police report. Not only does the set of facts outlined in the police report fail to establish voluntary consent, it points towards a lack

of consent. Both the presence of several uniformed police officers and the occupants' alcohol impairment have been found to suggest an absence of voluntary consent. Commonwealth v. Harmond, 376 Mass. 557, 561-562 (1978) ("Although the presence of several uniformed officers or the impairment of the defendant's understanding by reason of drinking may suggest the absence of consent, neither fact alone necessarily compels such a finding.").

Finally, the emergency exception did not apply. That doctrine permits a warrantless entry when an officer reasonably believes, based on specific, articulable facts, that someone is inside the home who needs immediate help due to an imminent threat of death or serious injury, or that entry "is necessary to prevent a threatened fire, explosion, or other destructive accident." Commonwealth v. DiGeronimo, 38 Mass. App. Ct. 714, 722-723 (1995). There must be "an objectively reasonable basis" for the officers' belief that there is an emergency, and the search must be confined to the scope of the emergency. Arias, 481 Mass. at 610. The exception is "narrowly construed[,]" and it is the Commonwealth's burden to show it applies. Id.

The entry here is clearly outside the scope of the emergency exception. In Commonwealth v. Kirschner, 67 Mass. App. Ct. 836, 842 (2006), this Court held that the emergency exception was inapplicable to officers' entry into a property's curtilage to investigate a report that fireworks had been set off there previously. The Court found, "even granting that the setting off of fireworks is an activity that carries some degree of danger, the situation faced by the police did not rise to the level of an emergency." Id. This situation is the same; though drunkenly tossing bottles from a first-floor apartment to the street may carry some degree of danger, it is no more hazardous than setting off illegal fireworks, and it did not create an emergency.

B. There is a Reasonable Possibility That The Verdict Would Have Been Different Without the Excludable Evidence.

Police identified the Defendant and observed bottles similar to those which damaged the victim's car as a product of the illegal entry into the Defendant's home. Without this evidence, the Commonwealth's case consisted of broken bottles near a car parked outside of a triple decker apartment building, and a report that those bottles were thrown

from the first-floor apartment. A motion to suppress would have been determinative in this case. Wong Sun v. United States, 371 U.S. 471, 487 (1963); Commonwealth v. Censullo, 40 Mass. App. Ct. 65, 69 (1996). The failure to file such a motion constituted ineffective assistance of counsel.

IV. THE MOTION JUDGE ERRED IN DENYING DEFENDANT'S SECOND MOTION TO VACATE HIS ADMISSION TO SUFFICIENT FACTS BECAUSE THE DEFENDANT RELIED ON PLEA COUNSEL'S INCOMPLETE ADVICE REGARDING THE IMMIGRATION CONSEQUENCES OF HIS PLEA.

A. Plea Counsel Did Not Adequately Advise The Defendant Of The Immigration Consequences Of His Plea.

The Sixth Amendment of the United States Constitution and Article 12 of the Massachusetts Declaration of Rights secure a defendant's rights to the effective assistance of counsel. Padilla v. Kentucky, 559 U.S. 356, 374 (2010); Commonwealth v. Sylvain, 466 Mass. 422, 436 (2013). In cases brought pursuant to Padilla and Commonwealth v. Clarke, 460 Mass. 30 (2011), "the defendant must show that counsel failed to adequately advise the defendant of the immigration consequences of his pleas and, as a result, the defendant was prejudiced." Commonwealth v. Balthazar, 86 Mass. App. Ct. 438, 440 (2014).

To render constitutionally sufficient representation, defense counsel must advise a non-citizen client of the *specific* immigration consequences of a plea. E.g., Commonwealth v. Lavrinenko, 473 Mass. 42, 54 (2015). A general warning that a plea may carry immigration consequences is insufficient. Padilla, 559 U.S. at 369; Commonwealth v. DeJesus, 468 Mass. at 177 n.3. An attorney's reading the language on the Tender of Plea or Admission Waiver of Rights form to his client, which defense counsel did here, is also insufficient. E.g., Commonwealth v. Henry, 88 Mass. App. Ct. 446, 454 (2015).

The motion judge erroneously found that counsel's advice to the Defendant that his plea "may have consequences of deportation" was sufficient under Padilla because the Defendant faced deportation because he entered the country illegally, not because of his admission in this case. R.A. 111. Though some courts have held that undocumented immigrants are unable to show prejudice under similar circumstances because the individual was deportable due to his status regardless of the conviction, the Supreme Judicial Court has expressly stated that

"consideration of the defendant's undocumented status in no way implies that an undocumented defendant can never successfully state a claim of ineffective assistance of counsel." Commonwealth v. Marinho, 464 Mass. 115, 130 n.21 (2013). What is required, however, is that undocumented defendants should "address the issue of their particular status and how different performance of counsel could have led to a better outcome." Id.

The motion judge is correct that at the time of the Defendant's plea, he was subject to removal from the United States because he was present in the country unlawfully. 8 U.S.C. § 1227(a)(1). However, an undocumented alien may apply for Cancellation of Removal and receive lawful permanent resident status if he can establish that: 1) he has been continuously physically present in the United States for at least ten years; 2) he has been of good moral character for that period; 3) he has not been convicted of certain crimes; and 4) his removal would result in exceptional and unusual hardship to his citizen or legal permanent resident spouse, parent, or child. 8 U.S.C. § 1229b(b). This Court "consider[s] the opportunity for such a petition . . . to be a serious benefit."

Commonwealth v. Martinez, 81 Mass. App. Ct. 595, 596 n.2 (2012).

The Defendant's plea in this matter resulted in his inability to petition for Cancellation of Removal, and thus deprived him of his only pathway to legal status. 8 U.S.C. § 1229b(b); 8 U.S.C. § 1182(a)(2). Though, as in Gordon, the consequences of the Defendant's plea may not have been as obvious as those in Padilla or Clarke because the determination required the review of several federal statutes, "the issue is not so complex or confused that a reasonably competent attorney would be uncertain of the consequences of the plea." Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 399 (2012) (defense counsel should have advised the defendant that his plea to an aggravated felony would result in, among other consequences, the inability to petition for cancellation of removal). "The issue is also highly significant, as it renders removal certain." Id. In fact, "'preserving the possibility of' discretionary relief from deportation . . .' would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed

to trial.'" Padilla, 559 U.S. at 368 (quoting I.N.S. v. St. Cyr, 533 U.S. 289, 323 (2001)).

Had defense counsel researched this issue, he could have easily determined that malicious destruction of property is a crime involving moral turpitude ("CIMT"). Matter of R, 5 I&N Dec. 612 (B.I.A. 1954) ("wanton and malicious destruction of property is a crime involving moral turpitude"). Further, any competent defense attorney should be aware that an admission to sufficient facts is treated as a conviction for federal immigration purposes.[5]

The Supreme Court has recognized that the ABA Standards, though not "inexorable commands," "may be valuable measures of the prevailing professional norms of effective representation. . ." Padilla, 559 U.S. at 367. The ABA Standard in effect at the time of the Defendant's plea advises defense counsel, "[t]o the

[5] An admission to sufficient facts is considered a conviction under federal immigration law because it involves a finding or admission to facts sufficient to warrant a finding of guilt, for which some form of punishment or restraint on liberty has been imposed. See 8 U.S.C. § 1101(a)(48)(A); Henry, 88 Mass. App. Ct. at 447 n.3 ("In evaluating immigration consequences, 'it remains appropriate to treat an admission to sufficient facts as the equivalent of a plea of guilty,' and we do so here.") (quoting Commonwealth v. Grannum, 457 Mass. 128, 130 n.3 (2010)).

extent possible," to "determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea." Margaret Colgate Love, Evolving Standards of Reasonableness: The ABA Standards and the Right to Counsel in Plea Negotiations, 39 Fordham Urb. L.J. 147, 161 (2011) (quoting ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f) (3d ed. 1999)). The Commentary accompanying this Standard states that counsel should "interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces," and to "be active rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant." Id. (quoting ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(f), cmt. (3d ed. 1999)).

Plea counsel's affidavit discloses that he made no such inquiry, stating that his standard practice was only to review the green sheet with his clients. R.A. 74. This failure alone is "sufficient to satisfy the deficient performance prong of the ineffective

assistance analysis." Lavrinenko, 473 Mass. at 53 (failure to ask client about his citizenship and immigration status constitutes deficient performance). Had counsel made the required inquiry, he would have understood that the Defendant was undocumented, and that his first priority was to remain in the United States so that he could continue to support his family. The Defendant's mother risked her home to provide her son a future in America. R.A. 125. The Defendant's younger siblings depended on him to fund their schooling and other necessities. R.A. 126. The Defendant also was determined to escape the violent gangs that controlled the city centers in his home country. R.A. 125-126. "Without making a reasonable inquiry of the client's immigration status, defense counsel [was] not in an adequate position to determine what advice [was] available." Lavrinenko, 473 Mass. at 53.

It does not matter that, at the time of the plea, the Defendant was not yet eligible for Cancellation of Removal. Prior to his plea, the Defendant had no impediment toward his eventual eligibility for Cancellation of Removal. It was not for the plea lawyer to conclude that this consequence was too

speculative to merit mention, despite its vital importance to his client. Plea counsel's role is to learn his client's priorities, to actively research the potential effects of the plea on those priorities, and to explain his findings to his client in language that the client can understand.

"[T]he standard practice for defense counsel in Massachusetts is to consider the immigration consequences that may attach to a sentence and to 'zealously advocate the best possible disposition' for the client." Marinho, 464 Mass. at 128 (quoting Committee for Public Counsel Services, Assigned Counsel Manual c. 4, at 22-24 (rev. June 2011)). The Supreme Court has recognized that

> [c]ounsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence.

Padilla, 559 U.S. at 373. However, this was not done in this case. Instead of advocating for the best possible disposition, defense counsel's recommended resolution denied the Defendant any chance of

remaining in the country, and the Defendant was unaware of the sacrifice he was making.

B. The Defendant Was Prejudiced By His Attorney's Failure To Provide Accurate Advice About The Immigration Consequences Of His Plea.

To satisfy the prejudice prong of the Saferian test, the Defendant must show that, "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Clarke, 460 Mass. at 47 (quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985)). To do so, the defendant must show:

> (1) he had an available, substantial ground of defence . . . that would have been pursued if he had been correctly advised of the dire immigration consequences attendant to accepting the plea bargain; (2) there is a reasonable probability that a different plea bargain (absent such consequences) could have been negotiated at the time; or (3) the presence of special circumstances that support the conclusion that he placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty.

Id. at 47-48 (internal citations, footnotes, and quotations omitted).

If the Defendant is able to establish at least one of these factors, the Court is to next determine "whether, under the totality of the circumstances,

there is a reasonable probability that a reasonable person in the defendant's circumstances would have gone to trial if given constitutionally effective advice." Commonwealth v. Lys, 481 Mass. 1, 7-8 (2018).

Though proving just one of the three Clarke factors would be sufficient, here, the Defendant can meet this burden in all three ways.

1. The Defendant had an available, substantial ground of defense.

First, as described above, the Commonwealth would have been unable to proceed to trial had defense counsel filed a motion to dismiss or a motion to suppress. See supra at pp. 23-34.

Second, even in the absence of a motion to dismiss or a motion to suppress, the Defendant would have had a strong defense at trial. The Commonwealth's case rested on the allegation that the Defendant was present in an apartment that contained beer bottles of the same brand that appeared to have broken the windshield of a nearby car. There was no evidence that the Defendant had thrown anything, or that he was involved in a joint venture to do so. At best, the Commonwealth could only establish mere presence, which would be insufficient evidence for

conviction. "Mere presence at the commission of the wrongful act and even failure to take affirmative steps to prevent it do not render a person liable as a participant." Commonwealth v. McCarthy, 385 Mass. 160, 163-164 (1982) (quoting Commonwealth v. Benders, 361 Mass. 704, 708 (1972)).

The Defendant would have been reasonable in proceeding to trial and relying on the Commonwealth's inability to present sufficient evidence to establish not only that he was the one who threw the bottles, but also that the throwing was done wilfully and maliciously, and caused more than $250 in damage. Further, the Defendant need not show that he would have been acquitted at trial if he had relied on these defenses; he simply needs to establish that a substantial defense was available to him. Lavrinenko, 473 Mass. at 57 n.19 ("To show that a 'substantial defense' was available, the defendant need not show that it was more likely than not that such a defense would have resulted in acquittal."). It would have been rational for the Defendant to proceed to trial and to rely on these defenses, rather than to admit to sufficient facts and lose his ability to seek Cancellation of Removal.

2. There is a reasonable probability that a different plea bargain could have been negotiated.

"[A] defendant may show prejudice by demonstrating 'a reasonable probability that a different plea bargain (absent [the dire immigration] consequences) could have been negotiated at the time.'" Gordon, 82 Mass. App. Ct. at 400 (quoting Clarke, 460 Mass. at 47) (brackets in original).

The motion judge erred in finding that, because the Defendant "received a very favorable disposition of a CWOF for an unsupervised probationary period[,]" and the Commonwealth would have been unlikely to dismiss the case outright, the Defendant cannot show a better plea could have been negotiated. R.A. 140. Though the motion judge is correct that the disposition would have been "very favorable" for a citizen, "[i]f an assessment of the apparent benefits of a plea offer is made, it must be conducted in light of the recognition that a noncitizen defendant confronts a very different calculus than that confronting a United States citizen." DeJesus, 468 Mass. at 184. As described above, the CWOF on the malicious destruction of property charge resulted in

the Defendant's ineligibility for Cancellation of Removal.

This consequence could have been spared had the Defendant requested that the Court guilty file the malicious destruction of property charge and sentence him to the same (or even more severe) conditions on the disturbing the peace charge. A guilty filed disposition would not have resulted in a conviction for federal immigration purposes. See 8 U.S.C. § 1101(a)(48) (defining conviction to require punishment, penalty, or restraint on liberty); Griffiths v. I.N.S., 243 F.3d 45 (1st Cir. 2001) ("guilty filed" disposition does not create a conviction where the court imposes no punishment, penalty, or restraint on liberty). The Commonwealth urged the Court to guilty-file the disturbing the peace charge and to find the Defendant guilty of malicious destruction of property and sentence him to one year of probation. The Defendant would have agreed to a higher fine, a longer term of probation, or even jail time, to preserve his ability to stay in the United States. R.A. 129. Where a defendant is willing to accept committed time in exchange for avoiding deportation consequences, this "suggests some

possibility that a different plea agreement could have been negotiated." Commonwealth v. Mohammed, 94 Mass. App. Ct. 1115, *2 (2019) (unpublished).

The plea judge would have likely accepted such a disposition. The judge accepted the Defendant's recommendation of a CWOF, which was more lenient than the Commonwealth's request and would have been highly favorable to the Defendant but for the immigration consequences. The Court would likely have been amenable to a harsher disposition that would have spared the Defendant from the catastrophic immigration consequences. See Marinho, 464 Mass. at 128 n.19 ("our precedent that a trial judge cannot factor immigration consequences into sentencing is no longer good law").

The Defendant must show only a "*reasonable probability* that a different plea bargain (absent such consequences) could have been negotiated at the time[,]" Clarke, 460 Mass. at 47 (emphasis added), not that he definitely would have been able to devise a plea agreement with the Commonwealth's assent that would avoid deportation consequences. He has made this showing.

3. The Defendant demonstrated special circumstances that support the conclusion that he would have placed particular emphasis on immigration consequences in deciding whether to admit to sufficient facts.

"In evaluating whether the defendant has established the existence of special circumstances, a judge must consider collectively all of the factors supporting the conclusion that the defendant 'placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty.'" Lys, 481 Mass. at 8 (quoting Clarke, 460 Mass. at 47-48). The motion judge found that the Defendant did not establish special circumstances in his 2017 Motion to Vacate Conviction, as he failed to "describe any employment or ties to the community at the time of his plea" other than having a girlfriend and having lived in the United States for less than two and a half years. R.A. 112.

The Defendant's 2019 affidavit makes clear that, at the time of the Defendant's plea, he was responsible for his siblings' education, his family's home, and not only his own future, but that of his siblings and mother as well. R.A. 124-129. The Defendant's family had mortgaged their land and family

home to pay for his journey to the United States. R.A. 125. The Defendant was the only hope the family had for the future. Despite his risking his safety to move to the capital city to work, the Defendant was still not able to make enough money. He was also physically threatened by gang members and his life was in danger. The Defendant followed his dream to the United States, where he worked hard and, despite his lack of formal education, was able to earn more in his first pay cycle than he could in an entire year in Guatemala. R.A. 126. He used this money to pay his mother back for the mortgage on her property, for his siblings' education, and to provide clothing and school materials for his nieces and nephews. The Defendant's future, and the education, health, and safety of his family members, depended on his ability to stay and work in the United States.

Defendants with similar backgrounds have been determined to have demonstrated special circumstances. E.g., Commonwealth v. Garcia, 85 Mass. App. Ct. 1123, *2 (2014) (unpublished) (special circumstances found where, among other factors, the defendant's priority at the time of his plea was to be released from custody so that he could support his family members).

Also, the danger the Defendant faced in Guatemala is an important factor. In Lavrinenko, the Supreme Judicial Court instructed that, if the defendant is a refugee, courts must consider that "the defendant might fervently desire to remain in the United States because of what he or she might face if deported, that is, the risk of persecution in his or her country of origin . . ." Lavrinenko, 473 Mass. at 58. Here, though the Defendant was not endowed with official refugee status, he credibly attested that he was afraid of the violent gangs that infested the streets of Guatemala. R.A. 124. He had witnessed his father's murder, and was himself the victim of an armed robbery at gunpoint by gang members. R.A. 123, 124. Though the Defendant did not have refugee status, the Court should have considered his fear of returning to Guatemala and again facing violence in determining if he demonstrated special circumstances. The Defendant sufficiently demonstrated that special circumstances existed at the time of his plea that showed that he would have placed a strong emphasis on immigration consequences in deciding whether to accept a plea.

4. There is a reasonable probability, under the totality of the circumstances the Defendant faced, that a reasonable person would have gone to trial if given constitutionally effective advice.

The ultimate prejudice determination asks if, "under the totality of the circumstances, there is a reasonable probability that a reasonable person in the defendant's circumstances would have gone to trial if given constitutionally effective advice." Lys, 481 Mass. at 7-8. This inquiry "rests on the totality of the circumstances, in which special circumstances regarding immigration consequences should be given substantial weight." Lavrinenko, 473 Mass. at 59.

A reasonable person in the Defendant's position, had he known he was sacrificing his only avenue to avoid deportation by admitting to sufficient facts, would not have done so under these circumstances. He was not facing a substantial sentence of incarceration if he had proceeded to trial and lost; the Commonwealth's case was flimsy; and the ability to stay in the United States and earn money to send back to his family in Guatemala was of paramount importance to the Defendant.

As the Iowa Supreme Court recently recognized, "[t]here is a vast difference for an unauthorized alien between being generally subject to removal and being convicted of a crime that subjects an unauthorized alien to automatic, mandatory, and irreversible removal." Diaz v. State, 896 N.W.2d 723, 733 (Iowa 2017). Because of changes in immigration policy and enforcement, and because of the ability to seek cancellation of removal, deportation is not a "foregone conclusion" for every unauthorized person. Id. Here, however, because of the Defendant's plea, his removal became automatic and irreversible.

The Defendant had two viable pretrial motions that would have ended the case before any trial or plea. In the event that those motions were pursued and somehow failed, the Defendant still had a very strong defense to the charges, and, as a non-citizen, there was no advantage to receiving a CWOF instead of a guilty verdict. The Defendant admitted to sufficient facts because he was unaware that it would permanently deprive him of his shot at the American dream. The Defendant most certainly would have insisted on pursuing a motion to suppress and a motion

to dismiss, and then a trial, had he known what was really at stake.

CONCLUSION

For the foregoing reasons, Mr. Solis respectfully requests that this Court reverse the motion judge's denial of the Defendant's Second Motion to Vacate Admission to Sufficient Facts and remand the case to the District Court for a new trial, or, in the alternative, remand the case to the District Court for an evidentiary hearing on his Motion to Vacate.

Respectfully submitted,
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By his Attorney,

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Date: April 6, 2020

Rule 16(k) Certification

I, Murat Erkan, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a)(13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. App. P. 20 because it is produced in the monospaced font Courier New at size 12, 10 characters per inch, and contains 46 total non-excluded pages.

/s/ Murat Erkan
Murat Erkan, Esq.

COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT

ESSEX, SS. NO. 2020-P-0075

COMMONWEALTH,
Appellee,

V.

BYRON SOLIS,
Appellant

Certificate of Service

I, Murat Erkan, counsel of record for the above-named appellant, hereby certify that I have today served a copy of the Defendant's brief and record appendix electronically on Assistant District Attorney Catherine L. Semel via the Appeals Court's Electronic Filing Service.

Respectfully submitted,

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ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

ESSEX, ss.

LAWRENCE DISTRICT COURT
DOCKET NO: 0118CR001495

COMMONWEALTH)
)
v.)
)
BYRON SOLIS[1],)
Defendant)

SECOND MOTION TO VACATE ADMISSION TO SUFFICIENT FACTS

Upon review of the additional information, the original decision stands.
MOTION DENIED J. Hogan 11-14-19

Now comes the Defendant and respectfully requests, pursuant to Mass. R. Crim. P. 30 and Mass. R. Crim. P. 13(a)(5), that this Honorable Court vacate his admission to sufficient facts and grant him a new trial on the above-captioned docket, for three reasons.

First, the Defendant's plea counsel's failure to file a motion to dismiss the complaint constituted ineffective assistance of counsel. Commonwealth v. Ortiz, 53 Mass. App. Ct. 168, 173-74 (2001); Commonwealth v. Ilya I., 470 Mass. 625, 627-628 (2015).

Second, the Defendant's plea counsel's failure to present a viable motion to suppress constituted ineffective assistance of counsel. Commonwealth v. Pena, 31 Mass. App. Ct. 201, 204 (1991), ("[t]he failure of counsel to litigate a viable claim of an illegal search and seizure is a denial of the defendant's Federal and State constitutional right to the effective assistance of counsel.")

Third, the Defendant's plea counsel failed to advise him of the specific immigration consequences of his plea, and failed to pursue a disposition absent such consequences, which omission prejudiced the Defendant. Padilla v. Kentucky, 559 U.S. 356 (2010); Commonwealth v. Lavrinenko, 473 Mass. 42 (2015).

On November 18, 2017 the District Court, the Honorable Justice Michele B. Hogan, considered and denied without a hearing a Motion to Vacate Conviction, which predecessor counsel, Attorney Rhonda Selwyn Lee, filed. The Appeals Court affirmed the District Court's ruling in a 1:28 memorandum of

[1] The complaint spells the Defendant's name "Byron Solis." His name is correctly spelled "Bayron Solis."

COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS **LAWRENCE DISTRICT COURT**
DOCKET No. 0118CR1495

COMMONWEALTH

v.

BYRON SOLIS

FINDINGS OF FACT

1. On August 21, 2001, the defendant, Byron Solis, admitted to sufficient facts to a complaint for disturbing the peace (G.L. c. 272, § 53) and malicious destruction of property over $250 (G.L. c. 266, § 127). The case was continued without a finding for one year and he was placed on unsupervised probation and ordered to pay restitution or, alternatively, $200 in court costs. He paid the court costs on September 21, 2001. He paid the legal counsel fee of $300 on August 27, 2002, and the case was dismissed. He ha a Spanish interpreter and was represented by attorney Brian R. Murphy. This Court would not have accepted the admission to sufficient facts if it not found that the defendant had not proffered the admission knowingly and voluntarily, after a colloquy.
2. The complaint was amended on May 24, 2001, to reflect that the defendant was born in 1978 (rather than 1968 as alleged), but according to a notice to appear in Immigration Court, he was born in 1979. Whether he was born in 1978 or 1979, he was either 22 or 23 years old when he offered the admission to sufficient facts.
3. On December 9, 2015, the Defendant of Homeland Security issued him a notice to appear for removal proceedings. The only basis for removal in the notice is the allegation that he is an illegal entrant. The notice does not mention these admissions to sufficient facts as a basis for removal as the defense states.

4. The defendant's motion and affidavit assert that "He faces mandatory deportation from the United States because of the conviction in his case" (motion) and that he is "facing mandatory removal for the United States, away form [his] family, because of the conviction that I have in this case and for no other reason" (affidavit). He also asserts that he could have argued a lack of specific intent because he was drunk at the time of the crime, and that there is "reasonable probability that a different plea bargain could have been negotiated" based on his history of alcohol abuse.
5. He has a son who was born in Lawrence on June 14, 2006, and he has raised his wife's 15-year old daughter. His wife, whom he married in 2014, claims that he works hard, no longer drinks alcohol, and supports the family.

RULINGS OF LAW

1. Despite the defendant's contention that the immigration consequences of his plea were clear, they were not. While an admission to disturbing the peace and malicious destruction of property over $250 is a conviction for purposes of Federal Immigration law, it is not clear that the admission renders him deportable. The offenses are not aggravated felonies, and the defendant does not identify any Federal immigration statute under which he is deportable because of his admission. In fact, he is not facing deportation for this admission at all. According to the notice to Appear, he faces deportation solely because he entered the country illegally at an unknown time. As such, plea counsel's advice to the defendant that his "admission to sufficient facts may have consequences of deportation" was sufficient under Padilla v. Kentucky, 559 U.S. 356 (2010).
2. The defendant suffered no prejudice as a result of his admission. There is little or no chance that he would have been successful defending himself against the specific intent element of malicious destruction of property over $250 based on his intoxication, and intoxication would have provided no defense at all to the charge of disturbing the peace.

3. The defendant received a very favorable disposition of a CWOF for an unsupervised probationary period. The only better plea bargain would have been outright dismissal, and there is no evidence that the prosecutor would have capitulated and dismissed the case. Therefore, it is not likely that a better plea bargain could have been negotiated.
4. No "special circumstances" existed at the time of his admission that would have made it rational to go to trial. On August 21, 2001, he was in his early twenties and had been in the country for less than two and a half years. He spent his entire childhood in Guatemala. He does not describe any employment or ties to the community at the time of his plea. According to his wife, she and the defendant have lived together since 2000, with their children, but their son was not born until 2006. At the time of the plea, *at the very most*, the defendant lived with his girlfriend and had no children. This does not rise to the level of "special circumstances."
5. Finally, the defendant cannot show that he was prejudiced by this admission because he faces deportation solely because he entered the country illegally.
6. Since the defendant has not raised a substantial issue, no hearing is necessary.

Michele B. Hogan
Justice, Cambridge District Court,
Sitting in Lawrence District Court

DATE: 5-18-17

UNITED STATES CONSTITUTION

Fourth Amendment:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Sixth Amendment:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

MASSACHUSETTS DECLARATION OF RIGHTS

Article Twelve:
ART. XII. No subject shall be held to answer for any crimes or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defence by himself, or his council, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land. And the legislature shall not make any law, that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury.

Article Fourteen:
ART. XIV. Every subject has a right to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or

foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities prescribed by the laws.

STATUTORY PROVISIONS

Mass. Gen. Laws Ann. ch. 266, § 127

Whoever destroys or injures the personal property, dwelling house or building of another in any manner or by any means not particularly described or mentioned in this chapter shall, if such destruction or injury is willful and malicious, be punished by imprisonment in the state prison for not more than 10 years or by a fine of $3,000 or 3 times the value of the damage caused to the property so destroyed or injured, whichever is greater, and imprisonment in jail for not more than 2 ½ years; or if such destruction or injury is wanton, shall be punished by a fine of $1,000 or 3 times the value of the damage to the property so destroyed or injured, whichever is greater, or by imprisonment for not more than 2 ½ years; if the value of the damage to the property so destroyed or injured is not alleged to exceed $1,200, the punishment shall be by a fine of 3 times the value of the damage to property or by imprisonment for not more than 2 ½ years; provided, however, that where a fine is levied pursuant to the value of the damage to the property destroyed or injured, the court shall, after conviction, conduct an evidentiary hearing to ascertain the value of the damage to the property so destroyed or injured. The words "personal property", as used in this section, shall also include electronically processed or stored data, either tangible or intangible, and data while in transit.

8 U.S.C.A. § 1229b

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien--

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;
(B) has been a person of good moral character during such period;
(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and
(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

RULES

Mass. R. Crim. P. 30(b):
(b) New Trial. The trial judge upon motion in writing may grant a new trial at any time if it appears that justice may not have been done. Upon the motion the trial judge shall make such findings of fact as are necessary to resolve the defendant's allegations of error of law.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-231

COMMONWEALTH

vs.

BYRON SOLIS.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant appeals from the denial of his motion to withdraw his plea without a hearing.[1] He raises two arguments on appeal. First, he argues that his motion raised a substantial issue of ineffective assistance of plea counsel such that it should not have been denied without an evidentiary hearing. Second, he argues that there is a reasonable probability that a reasonable person in his circumstances would have gone to trial had plea counsel given constitutionally effective advice concerning the immigration consequences of a plea. We affirm.

[1] The defendant styled his motion as one to vacate his conviction, but it is more accurate to characterize it as a motion to withdraw his plea; that is accordingly how we refer to it in this decision. In 2001, the defendant was charged with disturbing the peace, G. L. c. 272, § 53, and malicious destruction of property over $250, G. L. c. 266, § 127. He pleaded to sufficient facts, and the charges were continued without a finding for one year with unsupervised probation, at the conclusion of which they were dismissed.

We treat a motion to withdraw a plea the same as we would a motion for new trial, reviewing "whether there has been a significant error of law or other abuse of discretion." Commonwealth v. Sylvester, 476 Mass. 1, 5 (2016), quoting from Commonwealth v. Lavrinenko, 473 Mass. 42, 47 (2015). "Particular deference is to be paid to the rulings of a motion judge who [,as here,] served as the [plea] judge." Id. at 6, quoting from Commonwealth v. Scott, 467 Mass. 336, 344 (2014). "A judge may make the ruling based solely on the affidavits and must hold an evidentiary hearing only if the affidavits or the motion itself raises a 'substantial issue' that is supported by a 'substantial evidentiary showing.'" Sylvester, supra, quoting from Scott, supra. A defendant who claims ineffective assistance of counsel must establish that (1) the "behavior of counsel falling measurably below that which might be expected from an ordinary fallible lawyer" and, (2) as a result, the defendant was deprived "of an otherwise available, substantial ground of defence." Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

The defendant argues plea counsel was ineffective because counsel did not advise him that his plea could affect his future ability to seek discretionary relief from deportation. At the outset, we note two important facts. First, this is not a case where plea counsel gave no immigration advice at all or where

the immigration consequences were clear. Contrast Padilla v. Kentucky, 559 U.S. 356 (2010). Instead, plea counsel averred that, although he had no specific recollection of the defendant's case, it was his practice at the time to read the entire immigration warning from the plea form to his clients.[2] Second, at the time of his plea in 2001, the defendant was not entitled to discretionary relief under 8 U.S.C. § 1229b(b) (2012), about which relief, he now contends (fifteen years later), he was not advised. To qualify for discretionary relief under 8 U.S.C. § 1229b(b), a person must "establish that: (1) he has been physically present in the United States for a continuous period of not less than ten years; (2) he has not been convicted of certain enumerated crimes; . . . (3) his removal would result in exceptional and extremely unusual hardship to a qualifying family member[,]" and (4) he has "'been a person of good moral character' during the ten years immediately preceding his application." Da Silva Neto v. Holder, 680 F.3d 25, 28, 28 & n.4 (1st Cir. 2012), quoting from

[2] The specific language was, "I understand that if I am not a citizen of the United States, the acceptance by this court of my plea of guilty, plea of nolo contendere, or admission to sufficient facts may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization . . . ." We recognize that the attorney's obligation to advise his client is distinct from that of the judge, and we do not mean to imply that reading the plea form alone is sufficient to satisfy the attorney's obligation.

8 U.S.C. § 1229b(b)(1)(B).[3] At the time of his plea, the defendant did not meet these requirements. He had been in the United States only two years. And he does not contend, let alone show, that his removal from the country in 2001 would have resulted in an extremely unusual hardship to a qualifying family member.

Even were we to accept the defendant's proposition that plea counsel had an obligation to give immigration advice concerning a discretionary defense to deportation to which the defendant was not then entitled and for which he may or may not have qualified in the future, the defendant failed to show that (1) there was a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial," and (2) "a decision to reject the plea bargain would have been rational under the circumstances." Commonwealth v. Mercado, 474 Mass. 80, 83 (2016), quoting from Commonwealth v. Clarke, 460 Mass. 30, 47 (2011). "To prove the latter proposition, the defendant bears the substantial burden of showing that (1) he had an 'available, substantial ground of defence' that would have been pursued if he had been correctly

[3] "The applicant cannot demonstrate good moral character if he was convicted of a [crime involving moral turpitude] during that ten-year period." Da Silva Neto, supra at 28. The Court of Appeals for the First Circuit has determined that the crime of malicious destruction of property over $250 is a crime involving moral turpitude. Id. at 33.

advised of the dire immigration consequences attendant to accepting the plea bargain; (2) there is a reasonable probability that a different plea bargain (absent such consequences) could have been negotiated at the time; or (3) the presence of 'special circumstances' that support the conclusion that he placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty." Clarke, supra at 47-48 (quotation and footnote omitted). The judge concluded that the defendant had failed to meet his burden, a conclusion that was well within her discretion.

First, although the defendant contends he had a substantial ground of defense to the malicious destruction of property charge[4] because he was too intoxicated to form the requisite intent, the sole evidence of the defendant's intoxication was his own affidavit, which the judge was free to "reject as not credible," as she implicitly did here. Commonwealth v. Grant, 426 Mass. 667, 673 (1998).

Next, the judge could conclude (as she did) that a different plea bargain could not have been negotiated at the time. The only more favorable disposition the defendant could have received was a dismissal and, given that the Commonwealth was seeking a guilty finding, the judge was entitled to find it

[4] The defendant makes no argument regarding an available defense to the charge of disturbing the peace.

is unlikely the Commonwealth would have agreed to dismiss the charges. "Most importantly, no one was in a better position than the motion judge, who was also the plea judge, to know [a different disposition was not possible]." Commonwealth v. Lastowski, 478 Mass. 572, 577 (2018).

Finally, as the judge found, the defendant failed to prove any special circumstances existed at the time of the plea. At that time, the defendant had been in the country for only two years and lived with his girl friend. Contrast Commonwealth v. DeJesus, 468 Mass. 174, 184 (2014) (special circumstances existed where a defendant "had been in the country since he was eleven years old, his family was in Boston, and he had maintained steady employment in the Boston area"); Commonwealth v. Lavrinenko, 473 Mass. at 57 (defendant's status as a refugee is a special circumstance).

For the reasons set forth above, we conclude that the

motion judge did not abuse her discretion in denying the motion.[5]

Order denying motion to vacate plea affirmed.

By the Court (Wolohojian, Milkey & Englander, JJ.[6]),

Joseph F. Stanton

Clerk

Entered: February 12, 2018.

[5] The defendant also argues that it was error for the motion judge to adopt the Commonwealth's proposed findings of fact and rulings of law verbatim. Although, as we have often stated, it is better practice not to adopt wholesale proposed findings and analysis offered by a party, it is not necessarily error to do so. Here, the motion judge also was the plea judge, and her findings were fully supported by the record.

[6] The panelists are listed in order of seniority.

94 Mass.App.Ct. 1115
Unpublished Disposition

Appeals Court of Massachusetts.

COMMONWEALTH
v.
Elyas MOHAMMED.

17-P-1082
|
Entered: January 3, 2019

By the Court (Neyman, Ditkoff & Englander, JJ.[1])

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** The defendant, Elyas Mohammed, a legal permanent resident of the United States, admitted to sufficient facts and received a continuance without a finding on two charges, larceny from the person, G. L. c. 266, § 25, and assault and battery, G. L. c. 265, § 13A. The defendant appeals from a Boston Municipal Court judge's denial of his motion to withdraw his admissions. Concluding that the defendant presented a substantial issue of ineffective assistance of counsel, we remand for an evidentiary hearing on the issue of prejudice.

1. Standard of review. "A motion to withdraw a guilty plea is treated as a motion for a new trial pursuant to Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001)." Commonwealth v. DeJesus, 468 Mass. 174, 178 (2014). When a defendant appeals from the denial of a motion for a new trial, we review "only to determine whether there has been a significant error of law or other abuse of discretion." Commonwealth v. Sylvain, 473 Mass. 832, 835 (2016), quoting Commonwealth v. Lavrinenko, 473 Mass. 42, 47 (2015). We afford "substantial deference ... when the judge passing on the motion is the same judge who heard the plea." Sylvain, supra, quoting Commonwealth v. Grant, 426 Mass. 667, 672 (1998).

2. Plea counsel's advice. To prevail on a claim of ineffective assistance of counsel, "the defendant bears the burden of showing that his attorney's performance fell 'measurably below that which might be expected from an ordinary fallible lawyer,' and that he suffered prejudice because of his attorney's unprofessional errors." Lavrinenko, 473 Mass. at 51, quoting Commonwealth v. Clarke, 460 Mass. 30, 45 (2011). Here, at oral argument, the Commonwealth reasonably conceded, based on plea counsel's affidavit, that counsel gave the defendant inaccurate advice that the plea would not make him deportable. Such affirmative misadvice establishes the first prong of ineffectiveness. See Padilla v. Kentucky, 559 U.S. 356, 368-369 (2010) (defense counsel's failure to advise client that plea will result in deportation constitutes ineffective assistance of counsel).[2]

3. Prejudice. "In the context of a guilty plea, in order to satisfy the 'prejudice' requirement, the defendant has the burden of establishing that 'there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.' " Clarke, 460 Mass. at 47, quoting Hill v. Lockhart, 474 U.S. 52, 59 (1985). "At a minimum, this means that the defendant must aver that to be the case." Lavrinenko, 473 Mass. at 55, quoting Clarke, supra. "The defendant also 'bears the substantial burden' of 'convinc[ing] the court' that a decision to exercise his right to a jury trial

'would have been rational under the circumstances.' " Commonwealth v. Duart, 477 Mass. 630, 639 (2017), quoting Lavrinenko, supra at 55-56. The defendant must show either "(1) an available, substantial ground of defense that the defendant would have pursued if given proper advice about the plea's dire immigration consequences; (2) a reasonable probability that the defendant could have negotiated a plea bargain that did not include those dire immigration consequences; or (3) special circumstances supporting the conclusion that the defendant 'placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty.' " Commonwealth v. Lys, 481 Mass. 1, 7 (2018), quoting Clarke, supra at 47-48.

***2** "If an assessment of the apparent benefits of a plea offer is made, it must be conducted in light of the recognition that a noncitizen defendant confronts a very different calculus than that confronting a United States citizen." DeJesus, 468 Mass. at 184. Accordingly, the motion judge's determination that it would have been "irrational for [the defendant] to have rejected the plea on the basis of immigration issues" because "he put the case behind him," and "did so without risk of going to prison" was in error. The defendant indicated in his affidavit that he would have been willing to serve incarcerated time rather than be deported, and thus the defendant reasonably might have considered his right to remain in the United States "more important to [him] than any jail sentence." Id., quoting Padilla, 559 U.S. at 368. See Lee v. United States, 137 S. Ct. 1958, 1968-1969 (2017) (not irrational to reject plea where consequence of plea was deportation, even in light of overwhelming evidence of guilt).

"[A] defendant may show prejudice by demonstrating 'a reasonable probability that a different plea bargain (absent [the dire immigration] consequences) could have been negotiated at the time.' " Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 400 (2012), quoting Clarke, 460 Mass. at 47. Here, the defendant's expressed willingness to accept a committed sentence that would not expose him to deportation suggests some possibility that a different plea agreement could have been negotiated. See Gordon, supra at 400-401 (may have been rational for defendant to reject plea bargain where sentence of one day less would have left defendant eligible for relief from deportation). Whether the judge would have accepted a plea that the defendant also would have been willing to accept is a question to be explored on remand.

Similarly, the defendant's refugee status presents a substantial issue regarding possible special circumstances. See Lavrinenko, 473 Mass. at 59 (defendant's refugee status is "the result of a prior determination by the Federal government that deportation may be an especially severe and dangerous consequence" and must be considered as special circumstance that could establish prejudice). But see Commonwealth v. Lastowski, 478 Mass. 572, 579 (2018) (defendant's generalized concern that plea requiring him to register as sex offender would allow friends, family, and his employer to see his status on Internet did not constitute special circumstances). Here, the defendant avers in his affidavit that, as a former refugee, he feared that he would be "stuck in between a tribal war or even be[ ] forced to take part in one" if he returned to Somalia. Without any explicit consideration of the defendant's refugee status by the motion judge, we cannot conclude that the defendant failed to present a substantial issue regarding the existence of a special circumstance that may have prevented him from taking a plea that made him deportable. See Lavrinenko, supra at 60-61.

4. Evidentiary hearing. "If a motion judge finds that [the motion and affidavits] do present a substantial issue, then the judge must hold an evidentiary hearing." Lys, 481 Mass. at 6. Although the defendant has made a substantial initial showing of prejudice, affidavits alone are not sufficient to resolve these issues. See Commonwealth v. Almonte, 84 Mass. App. Ct. 735, 738 (2014) (improper to grant motion without evidentiary hearing where defendant's affidavit contradicted green sheet and plea counsel's affidavit). Without an evidentiary hearing, "we do not have the benefit of any findings or credibility assessments made by the motion judge," especially with respect to whether the defendant would have rejected the plea and instead accepted jail time, had he been properly advised that the plea would make him deportable. Sylvain, 466 Mass. 422, 439 (2013). Accordingly, an evidentiary hearing is required to determine whether the defendant was prejudiced by plea counsel's misadvice.[3]

***3** 5. Conclusion. We vacate the order denying the defendant's motion to withdraw his admissions and remand for further proceedings consistent with this memorandum and order.

So ordered.

Vacated

All Citations

94 Mass.App.Ct. 1115, 122 N.E.3d 1098 (Table), 2019 WL 80798

Footnotes

[1] The panelists are listed in order of seniority.

[2] A defendant's receipt of an alien warning "is not an adequate substitute for defense counsel's professional obligation to advise [his] client of the likelihood of specific and dire immigration consequences that might arise from such a plea." Commonwealth v. Sylvain, 466 Mass. 422, 425 n.2 (2013), quoting Clarke, 460 Mass. at 48 n.20. It may, however, be relevant to determining prejudice. See Clarke, supra.

[3] If the judge finds it is impractical to have the defendant testify at the courthouse, the judge has broad discretion to order an out-of-court deposition, videoconference testimony, or any other form of testimony. See Mass. R. Crim. P. 30 (c) (4), as appearing in 435 Mass. 1502 (2001); Commonwealth v. Arriaga, 438 Mass. 556, 570 (2003).

85 Mass.App.Ct. 1123
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

COMMONWEALTH
v.
Walter Adonay GARCIA.

No. 13–P–12.
|
June 4, 2014.

By the Court (BERRY, KATZMANN & SULLIVAN, JJ.).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

***1** Defendant Walter Garcia is a legal permanent resident of the United States. Garcia pleaded guilty in District Court in 2004 to assault and battery by means of a dangerous weapon, L. c. 265, § 15A(*b*), and indecent assault and battery on a person age fourteen or over, G.L. c. 265, § 13H, and was sentenced to 365 days in jail, 264 days suspended.[1] The United States Department of Homeland Security instituted a removal proceeding against him on February 24, 2012. Garcia then moved to withdraw his guilty plea and for a new trial based on ineffective assistance of counsel for failure to adequately advise him of the immigration consequences of the plea. See *Padilla v. Kentucky,* 559 U.S. 356, 366–368 (2010). See also *Commonwealth v. Sylvain,* 466 Mass. 422, 424 (2013).[2] The motion judge granted the motion after a hearing,[3] and the Commonwealth appeals. We affirm.

Discussion. To succeed on a claim of ineffective assistance of counsel, the defendant must demonstrate the prejudicial consequence of counsel's serious incompetency. See *Commonwealth v.. Clarke,* 460 Mass. 30, 46–47 (2011). See also *Commonwealth v. Saferian,* 366 Mass. 89, 96 (1974). The defendant has the burden of showing it would have been rational to reject the guilty plea by showing one of the following:

> "(1) he had an 'available, substantial ground of defence,' ... that would have been pursued if he had been correctly advised of the dire immigration consequences attendant to accepting the plea bargain; (2) there is a reasonable probability that a different plea bargain (absent such consequences) could have been negotiated at the time; [footnote omitted] or (3) the presence of 'special circumstances' that support the conclusion that he placed, or would have placed, particular emphasis on immigration consequences in deciding whether to plead guilty."

Commonwealth v. Clarke, supra at 47–48. We review a judge's decision on a motion for new trial "only to determine

whether there has been a significant error of law or other abuse of discretion." *Commonwealth v. Acevedo,* 446 Mass. 435, 441 (2006), quoting from *Commonwealth v. Grace,* 397 Mass. 303, 307 (1986). Reversal for abuse of discretion is particularly rare where, as here, the motion judge was also the trial judge. *Id.* at 441–442.

The only dispute in this case is whether the defendant suffered prejudice by counsel's failure to advise him properly prior to his guilty plea.[4] The motion judge concluded that the defendant suffered prejudice in pleading to a crime of violence with a sentence of one year. The judge, who was also the trial judge, concluded that the defendant could have negotiated for a lesser sentence—even by one day—thus avoiding the mandatory deportation for an aggravated felony. We agree.[5] See *Commonwealth v. Gordon,* 82 Mass.App.Ct. 389, 401 (2012).

The defendant was also subject to deportation for the commission of two crimes involving moral turpitude, not "arising out of a single scheme of criminal misconduct."[6] 8 U.S.C. § 1227(a)(2)(A)(ii). While the motion judge did not address the impact of this justification for deportation, we conclude that the record supports the conclusion that, had he been properly advised, the defendant would have attempted to bargain for a lesser sentence that did not trigger mandatory deportation or, failing a plea bargain, risk trial. The defendant has demonstrated "special circumstances that support the conclusion that he placed, or would have placed, particular emphasis on immigration consequences." *Clarke, supra.* Family, extensive ties, or connections to the United States "that might warrant a rational willingness to 'roll the dice' and opt for a trial, rather than to accept a plea bargain," can be sufficient to show special circumstances. See *Commonwealth v. Chleikh,* 82 Mass.App.Ct. 718, 729 (2012).

***2** The defendant had been a legal resident of the United States for seven years as of his plea bargain. He had significant family ties to the United States: his mother and two sisters lived near him in Pittsfield, as well as his thengirl friend (now fiancée).[7] At the time of the plea, the defendant's priority was that he be released from custody so that he could support those family members. The defendant had been employed by Unistress as a laborer for eight years. These special circumstances show the defendant would have placed particular emphasis on the immigration consequences of his plea. The failure to advise the defendant of those consequences prejudiced him and warrants a new trial.[8]

Order granting motion for new trial affirmed.

All Citations

85 Mass.App.Ct. 1123, 9 N.E.3d 868 (Table), 2014 WL 2472813

Footnotes

1 The two convictions emerged out of a single evening when the defendant, then twenty-three years old, was drinking alcohol with friends. According to the police report, the defendant touched a woman at the gathering under her blouse without consent. Then, according to the police report, an altercation began between the defendant and another attendee at the gathering, and the defendant cut that person with a piece of mirror that broke in the course of the altercation.

2 In Massachusetts, this right is retroactive for any convictions that became final after April 1, 1997. *Commonwealth v. Sylvain, supra* at 429 & n. 8.

3 The defendant was not able to be obtained from Federal detention for the hearing. No evidence was taken at the hearing, and on appeal the parties agree that no evidentiary hearing was required in this case to resolve the motion for new trial. Compare *Commonwealth v. Almonte,* 84 Mass.App.Ct. 735, 738–740 (2014).

4 There is no dispute that the defendant was not adequately advised of the deportation consequences of his plea—mandatory deportation. Deportation is mandated for a conviction of an aggravated felony, 8 U.S.C. §

1227(a)(2)(A)(iii), including a crime of violence with a term of imprisonment of at least one year, 8 U.S.C. 1101(a)(43)(G). Deportation is also mandated for committing two crimes involving moral turpitude, not "arising out of a single scheme of criminal misconduct." 8 U.S.C. § 1227(a)(2)(A)(ii). The defendant's plea required advice as to the consequences with respect to both of these provisions. Indeed, the Department of Homeland Security commenced removal proceedings in 2012 based on these provisions.

[5] The Commonwealth conceded at oral argument that it would have been proper to consider immigration consequences in sentencing. See *Commonwealth v. Marinho,* 464 Mass. 115, 128 n. 19 (2013).

[6] Indecent assault and battery is a crime involving moral turpitude. See *Maghsoudi v. Immigration & Naturalization Service,* 181 F.3d 8, 15 (1st Cir.1999). The Board of Immigration Appeals has ruled that assault and battery by means of a dangerous weapon is also a crime involving moral turpitude. See *In re D-,* 20 I. & N. Dec. 827, 830, 831 (BIA 1994). The defendant argues that the crimes of which he was convicted do not mandate deportation with respect to this provision because they arose out of the same "scheme of criminal misconduct." However, we assume, without deciding, that they did not emerge from the same scheme. See *Pacheco v. Immigration & Naturalization Service,* 546 F.2d 448, 452 (1st Cir.1976).

[7] The defendant's mother and two sisters are now United States citizens. It is unclear from the record whether they were citizens at the time of the guilty pleas. The defendant's fiancée, born in Florida, is a citizen. She is the mother of their child born in June, 2005, and a second child born in May, 2012. The defendant's fiancée has averred that her household depends on the defendant's financial support and parenting presence. Though determining that the defendant was subject to mandatory custody, the United States Immigration judge stated that "[t]he Court recognizes that the [defendant] has strong family ties, including a daughter, two sisters, mother and fiancée, all of whom are citizens of the United States, has been employed since August 2004, and has paid taxes."

[8] Below, the defendant also sought to vacate a conviction of failing to register as a sex offender, G.L. c. 6, § 178H(*a*), entered on February 22, 2005. The judge denied the motion, and the defendant did not appeal. The requirement to register arose out of the 2004 indecent assault and battery conviction vacated below. We note that the registration conviction may be subject to further proceedings depending upon the outcome of the new trial with respect to the 2004 indictments. In any event, insofar as the failure to register provided another basis for deportation proceedings, we do not consider this later occurrence in determining whether there was ineffective assistance with respect to his 2004 guilty plea. Cf. *Commonwealth v. Martin,* 427 Mass. 816, 822 (1998).

39 Fordham Urb. L.J. 147

Fordham Urban Law Journal
November, 2011

Article
Margaret Colgate Love[a1]

EVOLVING STANDARDS OF REASONABLENESS: THE ABA STANDARDS AND THE RIGHT TO COUNSEL IN PLEA NEGOTIATIONS

Abstract

The ABA Criminal Justice Standards have been recognized by the Supreme Court as one of the most important sources for determining lawyer competence in right to counsel cases. Because the constitutional test under the Sixth Amendment is whether defense counsel's performance was "reasonable" under "prevailing professional norms," the standard of competence is necessarily an evolving one. The Supreme Court's decision in Padilla v. Kentucky underscores the defense bar's stake in participating in the ABA standard-setting process to guide the development of defense counsel's obligations in plea negotiations. In addition, to the extent the courts give the ABA Standards credence in judging ineffective assistance claims, they can be powerful catalysts for changing the behavior of other actors in the plea process, as well as system norms. The Standards can also be leveraged to help the defense bar gain access to the additional resources necessary to comply with the constitutional obligations of defense lawyers post-Padilla. Two developments give this problem particular urgency: One is the proliferation of status-generated "collateral" penalties affecting every activity of daily life, penalties that are frequently more severe than any sentence potentially imposed by the court. The other is the broad applicability of these collateral penalties to misdemeanants and other minor offenders who in the past would have been spared the reduced legal status and stigma reserved for convicted felons. Part I of this Article analyzes the Supreme Court's treatment of ***148** *the ABA Standards in Sixth Amendment cases, and Part II discusses the manner in which the Standards are developed and approved as ABA policy. Part III describes the provisions of the Standards that govern plea negotiations, and proposes their expansion in light of the new mandate given defense lawyers by Padilla. It concludes by urging greater defender participation in the Standards process to shape how the Sixth Amendment standard evolves, and to maximize Padilla's systemic effect.*

Table of Contents

Introduction

In cases applying the Sixth Amendment right to counsel, the Supreme Court has given credence (if not quite deference) to what the bar thinks a lawyer's duty to the client ought to be. As the leading organization of legal professionals in the United States, the American Bar Association (ABA) has been a constant source of received wisdom on the topic of lawyer competence. Through its ethics rules and standards, the ABA exerts a powerful influence over how American lawyers behave, largely because the courts are their willing enforcers. Accordingly, the defense community has an important stake in participating in the ABA standard-setting process if it is to have some control over defender obligations under the Constitution. This Article argues that defense lawyers, particularly public defenders, should participate in a more sustained way in the process of developing ABA Criminal Justice Standards.

Part I analyzes the Supreme Court's treatment of the ABA Standards in Sixth Amendment right to counsel cases. Part II discusses the manner in which the Standards are developed and approved as ABA policy. Part III describes the provisions of the Standards that govern plea negotiations and proposes their expansion in light of the new ***149** mandate given criminal defense lawyers by Padilla v. Kentucky.[1] This Article concludes by proposing that defender organizations should seize the opportunity presented by Padilla to guide how the Sixth Amendment standard evolves and to maximize Padilla's systemic effect.

I. The ABA Standards in the Supreme Court

In Padilla v. Kentucky, the Supreme Court reaffirmed that the Sixth Amendment right to effective assistance of counsel applies to the guilty plea stage of a criminal case.[2] Until Padilla, however, the Court had not said much about the extent of counsel's constitutional duty to the client in plea negotiations. Indeed, the Court had even suggested that counsel need only advise about rights that the client would forego by entering a plea[3] and of the "direct" or court-imposed consequences that conviction would have.[4]

The Padilla Court recognized that counsel's Sixth Amendment duty to advise the client about the consequences of pleading guilty is frequently broader and more subtle, holding that "constitutionally competent counsel would have advised [the client] that his conviction for drug distribution made him subject to automatic deportation."[5] The Court thus ventured farther than any lower federal court in extending the right to counsel to the substance of a guilty plea, and to the consequences of conviction that are not part of the court-imposed sentence. The concurring Justices, noting the "longstanding and ***150** unanimous position of the federal courts" that lawyers need not inform their clients about this "collateral" consequence of conviction, called the Court's decision "a major upheaval in Sixth Amendment law" that "will lead to much confusion and needless litigation."[6] The dissenters warned that the logic--and thus the reach--of the Court's decision could not be limited to

deportation consequences "except by judicial caprice."[7]

While the Court's substantive holding in Padilla was unexpected, its constitutional analysis was familiar. The Court examined whether defense counsel's representation "[fell] below an objective standard of reasonableness," and whether there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[8] The first part of this test--first applied by Strickland v. Washington[9] in 1984 to trials and by Hill v. Lockhart[10] in 1985 to pleas--is "necessarily linked to the practice and expectations of the legal community: "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms."[11] The Strickland Court referred to "American Bar Association standards and the like," as "guides to determining what is reasonable . . . ."[12]

Given the Strickland Court's apparent stamp of approval, it was predictable that lower courts would rely upon ABA standards and ethics rules relating to guilty pleas to test the effectiveness of attorney performance in a variety of plea-related contexts.[13] Still, the courts ***151** stopped short of finding an affirmative obligation to advise the client about collateral consequences.[14] In Padilla, the Court took the plunge that the lower courts had worked hard to avoid, holding that "[t]he weight of prevailing professional norms supports the view that counsel must advise her client [considering a guilty plea] regarding the risk of deportation."[15] In the process, the Court reaffirmed and extended Strickland's reliance on the ABA Standards as "valuable measures of the prevailing professional norms of effective representation,"[16] citing two separate volumes of the Standards in addition to a variety of practice guides and treatises.[17]

The fact that the constitutional test of effective representation is "necessarily linked to the practice and expectations of the legal community"[18] has two important and related results. One is that the test is continually evolving. The other is that the legal community has a degree of control over what the Constitution means. The Padilla Court suggested as much when it noted, in support of its holding, how much emphasis the defense bar has placed on standard-setting and training in immigration law issues.[19]

***152** As might be expected, at least some of the Justices are not entirely comfortable with ceding even a limited degree of control over the constitutional test to private membership organizations. Thus, some professional codes and practice guides are accorded greater deference than others. For example, in Bobby v. Van Hook, the Court disapproved in a per curiam opinion of the lower court's reliance on a detailed set of ABA Guidelines enacted in 2003 long after the defendant's trial.[20] The Court distinguished the 2003 Guidelines from more general ABA standards in effect at the trial.[21] In doing so, the Court pointed out that the 131-page 2003 Guidelines "expanded what had been (in the 1980 [Criminal Justice] Standards) a broad outline of defense counsel's duties in all criminal cases into detailed prescriptions for legal representation of capital defendants."[22] The Court objected to treating the more detailed standards as "inexorable commands," as opposed to "'only guides' to what reasonableness means," reserving the possibility that it might "accept the legitimacy" of guidelines that did not "interfere with the constitutionally-protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions."[23] Justice Alito concurred separately to underscore his objection to according any "special relevance" to the 2003 ABA Guidelines, noting that the "venerable" ABA "is, after all, a private group with limited membership."[24] Justice Alito further noted that "[t]he views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 ***153** Guidelines, do not necessarily reflect the views of the American bar as a whole."[25]

II. The ABA Standards Process

The two most respected sources of criminal defense lawyers' professional duties to the client are the ABA Model Rules of Professional Conduct and the ABA Standards for Criminal Justice. The Model Rules are generally made directly enforceable against the lawyers who violate them by incorporating state codes of lawyer ethics. That way, the model rules are literally part of the "prevailing professional norms" to which lawyers in a given jurisdiction are bound. A lawyer who violates some specific ethical duty owed to the client under applicable rules is almost by definition guilty of deficient performance. (Of course, such deficient performance may or may not prejudice the client so as to violate the Sixth Amendment.)

The ABA Standards for Criminal Justice likewise spell out a lawyer's duty to his or her client. Because, however, the Standards are generally not incorporated into enforceable codes of lawyer conduct, they are less clearly a necessary measure of constitutionally deficient performance. Over the years, the Standards have earned their place as a measure of "prevailing professional norms" for purposes of the Sixth Amendment because the process by which they are developed is a thorough and balanced one.

The Standards are a multi-volume collection of best practices covering almost every aspect of the criminal process, ranging from familiar areas like pre-trial release, sentencing, and post-conviction remedies, to more contemporary issues involving technological means of surveillance and DNA evidence.[26] When the Standards project began ***154** in 1964 under the aegis of then-ABA President (and later Justice) Lewis Powell, such standards were "a novel concept."[27] When he introduced the first edition of the Standards in 1974, Warren Burger (who had been chair of the Standards project until his appointment as Chief Justice in 1969) described the project as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history" and recommended that "[e]veryone connected with criminal justice . . . become totally familiar with their substantive content."[28] Since that time, the seventeen original volumes of the Standards have been revised, in some cases several times, and new topics have been added to address newly-developed technology and newly important topics.[29] The Standards have proved a valuable resource for the courts,[30] for practitioners,[31] and for the academy.[32]

***155** The process by which the Standards are created underscores their influence. All segments of the criminal justice bar and bench are represented in their development, initially by a drafting task force and subsequently by the Standards Committee, which is a standing committee of the Criminal Justice Section whose nine members are composed of prosecutors, defense attorneys, academics, and judges.[33] Nonvoting liaisons from the major national organizations of prosecutors and defense lawyers, the National Association of Attorneys General and the U.S. Department of Justice, also participate at each stage of the work.[34] The balance of interests that these participants reflect has been a key feature of the process of developing the Standards since the inception of the project in the 1960s.[35] This balance remains ***156** essential to the status accorded the Standards by the courts in the Sixth Amendment context as the measure of "prevailing professional norms of effective representation" against which a criminal defense lawyer's performance will be tested.[36]

The draft that emerges from the Standards Committee then undergoes two readings, months apart, in the ABA Criminal Justice Section Council.[37] The Council's membership is also intentionally balanced.[38] Along the way, drafts are widely circulated and comments are invited.[39] While a Standards project has occasionally become controversial at the Council level, it has never been impossible to achieve consensus. Before the Standards become official ABA policy, they must be approved by vote of the ABA House of Delegates, which is a body ***157** composed of more than 500 representatives from states and territories, state and local bar associations, affiliated organizations, ABA sections, divisions, and members, and the Attorney General of the United States, among others.[40] Once the House approves the Standards, they become the official policy of the 400,000 member ABA.[41]

Many steps must be completed before the Standards are finally adopted as ABA policy, and a broad array of viewpoints are involved in the process. The preparation of commentary, which takes place after ABA House approval, consumes at least another year. It is thus easy to see why the entire process frequently takes more than five years to complete, even just for a revision of an existing volume. But after all is said and done, the ABA can confidently claim that the practical guidance reflected in the Standards is "based on the consensus views of a broad array of professionals involved in the criminal justice system."[42] It can also be assured that the Standards will be perceived as "a balanced, practical work intended to walk the fine line between the protection of society and the protection of the constitutional rights of accused individual[s]."[43]

Before leaving the discussion of the arduous and time-consuming process by which the ABA Standards are hammered out, it bears emphasizing that the defense bar can and should have a significant influence over that process. It must insist on doing so where defense counsel's performance is at issue because, as the Court emphasized in Padilla, the bar's standard-setting entities have considerable influence over what the Sixth Amendment requires.[44] To the extent the ABA can be said to speak for the bar (pace Justice Alito[45]), it is in the Standards process more than anywhere else that "prevailing professional norms of effective representation" will emerge. Accordingly, the defense community has an important stake in paying close attention

to and participating actively in the Standards process if it is to ***158** have some control over how its evolving Sixth Amendment obligations are reflected and codified in the Standards.

III. Evolving Standards of Reasonableness

A. Current ABA Standards Relating to Representation in Plea Negotiations

The ABA Standards emphasize a defense lawyer's duty to represent a client competently in the pretrial stages of a criminal case, including in plea negotiations. This means that, at a minimum, counsel must "keep the defendant advised of developments arising out of plea discussions conducted with the prosecuting attorney, and . . . promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney."[46] Counsel must also "explore the possibility of an early diversion of the case from the criminal process"[47] and "promptly communicate and explain to the accused all significant plea proposals made by the prosecutor."[48] The ABA Criminal Justice Standards have contained these requirements for more than thirty years,[49] and they have been cited by numerous courts both before and after Strickland as establishing the norm of effective representation in ***159** the guilty plea context.[50] They reflect the judgment that the decision to plead guilty is so vital that it is specifically identified in the Model Rules of Professional Conduct as one of the very few that cannot be made by the lawyer alone.[51] Thus, the decision whether to plead and what plea agreement to accept are "ultimately for the accused . . . after full consultation with counsel."[52] The Standards also require that a lawyer must fully explain and advise about the choices available to a client considering a plea offer, after conducting an appropriate investigation and analysis of all pertinent issues of fact and law:

> [T]o aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and considerations deemed important by defense counsel or the defendant in reaching a decision. Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed.[53]

The commentary to this Standard explains that "[t]his is a critical standard because the system relies, at heart, on defense counsel to ensure ***160** that a defendant's guilty plea is truly knowing and voluntary and is entered in his or her best interests."[54]

The Standards caution courts not to accept a plea "where it appears the defendant has not had the effective assistance of counsel."[55] At the same time, the standards envision a comparatively modest role for the court in apprising a defendant about the consequences of a plea:

> Although the court must inquire into the defendant's understanding of the possible consequences at the time the plea is received . . . this inquiry is not, of course, any substitute for advice by counsel. The court's warning comes just before the plea is taken, and may not afford time for mature reflection. The defendant cannot, without risk of making damaging admissions, discuss candidly with the court the questions he or she may have. Moreover, there are relevant considerations that may not be covered by the judge in his or her admonition. A defendant needs to know, for example, the probability of conviction in the event of trial.[56]

The Standards currently say very little about the prosecutor's role in ensuring that a defendant understands the consequences of pleading guilty, except to say that prosecutors should not misrepresent facts or law in plea negotiations[57] or lead an unrepresented person to believe that the prosecutor is "on [his or her] side."[58]

Until 1999, the Standards did not specifically refer to "collateral consequences"[59] in the context of plea negotiations.[60] In the third edition ***161** revision of the Pleas of Guilty Standards, Standard 14-3.2(f) asks defense counsel, "[t]o the extent

possible," to "determine and advise the defendant, sufficiently in advance of the entry of any plea, as to the possible collateral consequences that might ensue from entry of the contemplated plea."[61] The commentary to this Standard urges counsel to "interview the client to determine what collateral consequences are likely to be important to a client given the client's particular personal circumstances and the charges the client faces," and to "be active rather than passive, taking the initiative to learn about rules in this area rather than waiting for questions from the defendant."[62] It also notes that since the second edition of the Standards was published in 1980, "the number and significance of potential collateral consequences had grown to such an extent that it [was] important to have a separate standard to address this obligation."[63] The "separate standard," however, consists of a single sentence, and the obligation it imposes is modestly hedged by the introductory phrase "to the extent possible."[64]

The Pleas of Guilty Standards contemplate that the court will participate in alerting a defendant considering a guilty plea about possible collateral consequences.[65] Since, however, "only defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case,"[66] in the absence of ***162** a court rule, the court's admonishment is primarily a means of confirming that counsel's duty of advisement has been carried out.[67]

In summary, the current Standards give effect to an accused individual's paramount right to make a fully informed decision as to whether or not to plead guilty, a decision that is "fundamental" or "substantive" because it is highly personal and derives from constitutional guarantees.[68] The Standards emphasize that defense counsel plays a pivotal role in advising the accused individual at this critical stage of the case. If counsel fails to fully and accurately explain the choices that a client faces, the client will be effectively deprived of the right to knowingly and intelligently make a decision that will predictably have a dramatic effect on his or her future. While the Standards acknowledge a role for the court in admonishing the defendant about the range of status-generated "collateral consequences" that flow from a guilty plea, they also emphasize that "only defense counsel is in a position to ensure that the defendant is aware of the full range of consequences that may apply in his or her case."[69] The Standards recognized well before the courts that defense counsel's advisement role under the Sixth Amendment is very different from that of the court under the Due Process Clause.[70]

B. The Need for Revisions to the Standards Post-Padilla

The ABA Standards provide an adequate framework for delineating defense counsel's role in counseling clients in plea negotiations. In many respects, that framework is an excellent one. But Padilla confirms the need not only for additional practical guidance, but also for an expansion of the legal profession's expectation of how competent defense counsel should perform. Two developments give this ***163** problem a degree of urgency. One is the proliferation of status-generated penalties affecting every activity of daily life--penalties that are frequently more severe than any sentence that a court may potentially impose.[71] The other is the broad applicability of these collateral penalties to misdemeanants and other minor offenders who in the past would have been spared the reduced legal status and stigma reserved for convicted felons.[72]

Cases decided since Padilla suggest that competent counsel will be required, as a matter of constitutional law, to warn a client considering a guilty plea about the consequences of conviction that are severe, certain, and of predictable importance to the client, and whether these consequences arise from statute, regulation, or contract.[73] To catch up to this fast-moving judicial train, the ABA Standards should be expanded to include a checklist of duties in connection with plea negotiation to elaborate the general competence requirements in the existing Standards, including how defense counsel should relate to other actors in the process where collateral penalties are concerned. Such a checklist[74] should include, at a minimum:

> ***164** • Identifying and advising the client about all consequences of conviction that are likely to be important to the client, in time to enable the client to consider this information in deciding whether to pursue trial, plea, or other dispositions;[75]
>
> • Seeking dispositions and sentences that avoid or minimize applicable collateral penalties in accordance with the client's goals;[76]

• Considering collateral penalties in negotiations with the prosecutor over particular dispositions (including dispositions that avoid conviction),[77] and in communications with ***165** the court or court officers regarding the appropriate sentence or conditions to be imposed;[78] and

• Advising the client about applicable procedures for obtaining relief from collateral sanctions, including expungement or sealing of records of conviction and arrest, certificates of relief from disabilities, and pardon.[79]

The availability of a full inventory of collateral consequences is obviously necessary to make practicable the duty of advisement described above.[80] While the situation of clients who are not citizens may have a particular urgency in light of the almost-irremediable consequence of deportation, there are many other kinds of consequences that impose significant and lasting burdens on clients that must be ***166** addressed in the earliest stages of plea discussions.[81] An inventory of collateral consequences will not only make it more practicable for defense counsel to discharge their duty of advisement, but it will also facilitate the court's responsibility to ensure that a defendant pleading guilty has been appropriately advised,[82] and the government's responsibility to reassure the public that a case has been dealt with in a just manner, consistent with public safety.[83]

The second development that gives urgency to the project of elaborating performance standards for defense counsel relating to collateral consequences is the disproportionate severity of collateral penalties attaching to even the most minor offenses, which has raised the stakes on early pleas where counsel has not had time to adequately investigate the client's situation. More generally, it has raised anew issues of whether and when persons who are not exposed to a prison sentence should be entitled to counsel before they give up their right to contest their guilt.[84] The facts of life in busy misdemeanor courts ***167** make a mockery of the current ABA Standard warning that defense counsel should "under no circumstances . . . recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed."[85] At the same time, the severity of the penalties to which even misdemeanants are now exposed lends constitutional force to policy arguments that clients charged with minor crimes should not be compelled to plead as a condition of release. If "prevailing professional norms" forbid a lawyer to advise a client to plead at first appearance before adequate investigation and counseling can take place, any such plea would be entered in the absence of genuine defense representation, and would thus be vulnerable to constitutional challenge.[86] It is safe to predict that an insistence on a genuine opportunity for counseling in light of the severity of potential collateral consequences will result either in fewer pleas or, in time, fewer consequences.[87]

Conclusion

The ABA Criminal Justice Standards have been recognized by the Supreme Court as one of the most important sources for determining defense counsel competence under the Sixth Amendment. Because the constitutional test is whether defense counsel's performance was "reasonable" under "prevailing professional norms," it is necessarily an evolving one. Accordingly, it behooves defender organizations to take an active role in the ABA Standards process to guide the development ***168** of defender obligations under the Sixth Amendment. In addition, to the extent the courts give the Standards credence in judging ineffective assistance claims, they can be powerful catalysts for changing the behavior of other actors in the process, as well as system norms. Finally, the Standards can be leveraged to help defense attorneys gain access to the additional resources necessary to comply with their constitutional obligations post-Padilla. In a word, the Standards can and should be used as a sword and a shield by defenders who are determined not to let the crisis moment the Padilla decision presents go unimproved.

Footnotes

[a1] Law Office of Margaret Love. Ms. Love has chaired two drafting task forces of the ABA Standards Committee (Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons, 2001-2004, and Standards on the Treatment of Prisoners, 2005-2010). Since 2009 she has served as liaison to the Standards Committee from the National Legal Aid & Defender Association.

[1] 130 S. Ct. 1473 (2010).

[2] Id. at 1486 ("[T]he negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." (citing Hill v. Lockhart, 474 U.S. 52, 57 (1985))); see also McMann v. Richardson, 397 U.S. 759, 770-71 (1970).

[3] McMann, 397 U.S. at 769-71; see also Libretti v. United States, 516 U.S. 29, 50-51 (1995) ("Apart from the small class of rights that require specific advice from the court under Rule 11(c), it is the responsibility of defense counsel to inform a defendant of the advantages and disadvantages of a plea agreement and the attendant statutory and constitutional rights that a guilty plea would forgo."). In Hill, 474 U.S. at 52-53, the Court did not reach the question whether counsel's failure to explain the terms of parole eligibility was constitutionally deficient, since Hill had not claimed that he was prejudiced thereby.

[4] Padilla, 130 S. Ct. at 1488 (Alito, J., concurring) ("'Virtually all jurisdictions'--including 'eleven federal circuits, more than thirty states, and the District of Columbia'--'hold that defense counsel need not discuss with their clients the collateral consequences of a conviction,' including deportation'' (quoting Gabriel J. Chin & Richard Holmes, Effective Assistance of Counsel and the Consequences of Guilty Pleas, 87 Cornell L. Rev. 697, 699 (2002))).

[5] Id. at 1478.

[6] Id. at 1487, 1491, 1487 (Alito, J., joined by Roberts, C.J., concurring).

[7] Id. at 1496 (Scalia, J., dissenting).

[8] Id. at 1481 (quoting Strickland, 466 U.S. at 688, 694 (1984)).

[9] 466 U.S. 668 (1984).

[10] 474 U.S. 52 (1985).

[11] Padilla, 130 S. Ct. at 1481 (quoting Strickland, 466 U.S. at 688).

[12] Strickland, 466 U.S. at 688. In the years after Strickland, the Court repeatedly cited the ABA Standards in measuring effective attorney performance under Strickland's first prong. See, e.g., Rompilla v. Beard, 545 U.S. 374, 387 (2005) ("[W]e long have referred [to these ABA Standards] as 'guides to determining what is reasonable.'"); Wiggins v. Smith, 539 U.S. 510, 524 (2003) ("[ABA]standards to which we long have referred as 'guides to determining what is reasonable'").

[13] See, e.g., United States v. Blaylock, 20 F.3d 1458, 1466 (9th Cir. 1994) ("Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant." (citing ABA Pleas of Guilty Standards)); Johnson v. Duckworth, 793 F.2d 898, 901 (7th Cir. 1986) ("The Code of Professional Responsibility and the American Bar Association Standards for Criminal Justice likewise indicate that a defendant should be informed about and participate in the plea bargaining process."); Jiminez v. State, 144 P.3d 903, 906 (Okla. Crim. App. 2006) ("Competent representation under prevailing professional norms includes, at a bare minimum, communicating with the client concerning offers to settle a case" (citing Oklahoma ethics rules and ABA Standards)); Davie v. State, 381 S.C. 601, 609 (2009) (failure to communicate with client about a plea offer "constitutes unreasonable performance under the prevailing professional standards established by the American Bar Association or state-specific ethical rules of conduct"); State v. James, 739 P.2d 1161, 1167 (Wash. Ct. App. 1987) (counsel's duty under ethics rules and ABA Standards includes "not only communicating actual offers, but discussion of tentative plea negotiations and the strengths and weaknesses of defendants' case so that the defendants know what to expect and can make an informed judgment whether or not to plead guilty").

[14] See Padilla, 130 S. Ct. at 1488 (Alito, J., concurring). See generally Jenny Roberts, Ignorance is Effectively Bliss: Collateral Consequences, Silence, and Misinformation in the Guilty-Plea Process, 95 Iowa L. Rev. 119, 131-139 (2009) (analyzing the "affirmative misadvice" rule as a "flawed exception to the flawed collateral consequences rule").

[15] Padilla, 130 S. Ct. at 1482.

[16] Id.

[17] Padilla, 130 S. Ct. at 1482-83. The Court cited the ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-5.1(a) (3d ed. 1993) [hereinafter Defense Function Standards or Prosecution Function Standards, depending upon the section cited] and the Standards for Criminal Justice, Pleas of Guilty 14-3.2(f) (3d ed. 1999) [hereinafter Pleas of Guilty Standards], as well as the National Legal Aid and Defender Association, Performance Guidelines for Criminal Representation § 6.2 (1995), a Justice Department compendium of standards for indigent defense systems, and a variety of academic treatises and law review articles.

[18] Id. at 1482.

[19] Id.

[20] See Bobby v. Van Hook, 130 S. Ct. 13, 17 (2009) (holding that the 2003 Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases were "quite different" from the Standards for Criminal Justice that the Court had approved in Strickland as an appropriate guide to what is reasonable performance under the Sixth Amendment).

[21] Id.

[22] Id. More specifically, the 2003 Guidelines
discuss the duty to investigate mitigating evidence in exhaustive detail, specifying what attorneys should look for, where to look, and when to begin. See ABA Guidelines 10.7, comment., at 80-85. They include, for example, the requirement that counsel's investigation cover every period of the defendant's life from "the moment of conception," id. at 81, and that counsel contact 'virtually everyone ... who knew [the defendant] and his family' and obtain records 'concerning not only the client, but also his parents, grandparents, siblings, and children,' id. at 83. Judging counsel's conduct in the 1980s on the basis of these 2003 Guidelines--without even pausing to consider whether they reflected the prevailing professional practice at the time of the trial--was error.
Id.

[23] Id. at 17 n.1.

[24] Id. at 20.

[25] Id. The 2003 Guidelines were a joint project of the ABA Standing Committee on Legal Aid and Indigent Defendants and the ABA Special Committee on Death Penalty Representation. See American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 914 (2003). The long list of acknowledgments introducing the Guidelines does not appear to include any prosecutors or government representatives, or any official liaisons to the project from national organizations representing prosecutors or attorneys general. See id. Nor do any sitting judges appear to have participated in the project. See id. By contrast, as described in the following section, the process for developing the Criminal Justice Standards has from the beginning of the project in the 1960s been regarded as reflecting the views of all segments of the profession. See Martin Marcus, The Making of the ABA Criminal Justice Standards: Forty Years of Excellence, 23 Crim. Just. 10, 14-15 (2009).

[26] A complete set of the Standards, which are divided into volumes by topical area, and a history of their development, are available at http:// www.americanbar.org/groups/criminal_justice/policy/standards.html. The history of the Standards, their use by courts, and the process by which they are developed, are usefully elaborated in Marcus, supra note 25, at 14-15. At the time his article was published, Judge Marcus was particularly well-qualified to comment on the Standards process, having been involved in it for a number of years as chair of several drafting task forces, as a member of the Committee, and as the Committee's chair. See also Rory K. Little, The Role of Reporter to a Law Project, 38 Hastings Const. L.Q. 747 (2011) (describing the process of revising the Criminal Justice Standards for the Prosecution and Defense Function, by the reporter to that project).

[27] B.J. George, Jr., Symposium on the American Bar Association's Mental Health Standards: An Overview, 53 Geo. Wash. L. Rev. 338, 388-39 (1985).

[28] Warren E. Burger, Introduction: The ABA Standards for Criminal Justice, 12 Am. Crim. L. Rev. 251, 251 (1974).

[29] Among volumes recently approved for the Third Edition are Special Functions of the Trial Judge (2000); Electronic Surveillance of Private Communications (2002); Collateral Sanctions and Discretionary Disqualification of Convicted Persons (2004); Speedy Trial and Timely Resolution of Criminal Cases (2006), and Treatment of Prisoners (2010). The black letter of Standards on Prosecutorial Investigations has been approved, with publication forthcoming. The on-going revisions of the Prosecution and Defense Function Standards will be the first volumes in the Fourth Edition.

[30] Marcus reports that "[a] recent Westlaw search indicates that more than 120 Supreme Court opinions quote from or cite to the Standards and/or their accompanying commentary," and "[o]ver the past 40 years, the federal circuit courts have cited to the Standards in some 700 opinions, beginning the year the first Standards were published." Marcus, supra note 25, at 11 (citing Bruce v. U.S., 379 F.2d 113, 120 n.19 (D.C. Cir. 1967) (citing Standards Relating to Pleas of Guilty)). In addition, the Standards have "had a major impact on court rules." Id.

[31] See Marcus, supra note 25, at 12 (citing examples).

[32] A Symposium: The American Bar Association Standards Relating to the Administration of Criminal Justice, Part II, 12 Am. Crim. L. Rev. 415 (1975); A Symposium: The American Bar Association Standards Relating to the Administration of Criminal Justice, Part I, 12 Am. Crim. L. Rev. 251, 251-414 (1974); B.J. George, Jr., supra note 26; Marcus, supra note 25, at 13 (citing Symposium on the Collateral Sanctions in Theory and Practice, 36 U. Tol. L. Rev. 441 (2005)). To these might be added Sharon Dolovich, Strategic Segregation in the Modern Prison, 48 Am. Crim. L. Rev. 1 (2011), devoted to the 2010 Treatment of Prisoners Standards, and Justin Marceau, Don't Forget Due Process: The Path Not (Yet) Taken in §2254 Habeas Corpus Adjudications, 62 Hastings L.J. 1 (2011), Lissa Griffin & Stacy Caplow, Changes to the Culture of Adversaries: Endorsing Candor, Cooperation and Civility in Relationship Between Prosecutors and Defense Counsel, 38 Hastings Const. L.Q. 845 (2011), devoted to the revisions of the Prosecution Function and Defense Function Standards.

[33] About Criminal Justice Standards, ABA Criminal Justice Section, http://www.americanbar.org/groups/criminal_justice/policy/standards.html (last visited Dec. 29, 2011).

[34] See Marcus supra note 25, at 14-15. Marcus describes the progress of a draft from task force to Standards Committee to CJS Council as follows:
With the chair presiding over its discussions, a particular task force may meet from four to eight times until a draft is finalized. At each meeting, the discussion focuses on extensive memoranda and preliminary drafts. The task force reporter, usually a law professor, judge, or practitioner, well-schooled and experienced in the subject matter of the Standards--has disseminated well in advance of each meeting.... [O]nce a task force draft is completed, it is sent to the Standards Committee. In a series of its own meetings, the committee, aided by the task force chair and reporter, reviews, revises, and approves the draft. Although the Standards Committee recognizes and often defers to the expertise of those specialists who serve on the task force and to the compromises reached in task force meetings, the discussions in the Standards Committee are often spirited and may lead to significant, substantive changes, as well as stylistic ones, in the Standards draft. As in the task forces, though, the goal is persuasion and consensus; close votes on the language of a particular Standard are rare ....
Id.

[35] In 1974, Chief Justice Burger described the ABA committee that developed the first edition of the Standards as comprised of "more than 100 of the nation's leading jurists, lawyers and legal scholars operating in advisory committees of 10 or 12 each," with "the participants ... drawn from every part of the country and includ[ing] state and federal judges, prosecuting attorneys, defense lawyers, public defenders, law professors, penology experts and police officials." See Burger, supra note 28, at 251. This broad range of experience and perspective made the Standards "much more than a theoretical and idealistic restatement of the law, but rather a synthesis of the experience of a diverse and highly experienced group of professionals." Id.

[36] See, e.g., Bobby v. Van Hook, 130 S. Ct. 13, 17 (2009) (contrasting the Standards with the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases); supra notes 18-22 and accompanying text. Since the early 1990s, there has been a formal membership quota system intended to keep membership on the Standards Committee balanced between prosecutors and defenders, with academics and judges together constituting a third interest group. However, this system seems to have resulted over the years in a larger representation of prosecutors than of defenders on the Standards Committee--at least if one understands a defender to be someone whose career has been devoted to defense work. It has struck this observer that prosecutors who leave government to engage in defense work rarely become public defenders, frequently do not lose a prosecutorial perspective, and may even return to government midway through their term on the committee. Accordingly, defender representatives on the Standards Committee, as on the Criminal Justice Section Council, may not share a common viewpoint and speak with one voice in the same way that prosecutors do. In recent years, public defenders have been in particularly short supply on both the Standards Committee and the Council, which makes the liaison role of the national defender organizations particularly important.

[37] See Marcus, supra note 25, at 15.

[38] See id.

[39] The procedure after the Standards Committee submits its approved draft of the black letter to the Criminal Justice Section Council is described as follows:
Again with the assistance of the task force chair and reporter, the Council reviews, revises, and approves draft Standards in at least two meetings, in which the Standards receive a first and second "reading." Before each reading, drafts are circulated widely within and outside the ABA, and comments are solicited, not only from the Section's own committees, but also from the national organizations represented on the Council and other potentially interested individuals and organizations. As in the Standards Committee, despite the deference owed and given to the expertise and effort that produced the draft before the Council, significant changes may result from the Council's discussions as the body seeks to achieve a final consensus of opinion.
Id. at 15.

[40] See id.

[41] See id.

[42] See Brief for the American Bar Association as Amicus Curiae Supporting Respondents, Missouri v. Frye (No. 10-444) and Lafler v. Cooper (No. 10-209), 2011 WL 3151278 at *2-*3.

[43] Burger, supra note 28, at 252.

[44] Padilla, 130 S. Ct. at 1482-83.

[45] See Bobby v. Van Hook, 130 S. Ct. 13, 20 (2009) (Alito, J., concurring) ("The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole.").

[46] See Pleas of Guilty Standards, supra note 17, Standard 14-3.2(a).

[47] See Defense Function Standards, supra note 17, Standard 4-6.1(a); see also Pleas of Guilty Standards, supra note 17, Standard 14-3.2(e) ("At the outset of a case and whenever the law, nature and circumstances of the case permit, defense counsel must 'explore the possibility of a diversion of the case from the criminal process.'").

[48] See Defense Function Standards, supra note 17, Standard 4-6.2(b). The commentary to Standard 4-6.2 explains:
Because plea discussions are usually held without the accused being present, the lawyer has the duty to communicate fully to the client the substance of the discussions.... It is important that the accused be informed ... of proposals made by the prosecutor; the accused, not the lawyer, has the right to decide ... [on] prosecution proposal[s], even when a proposal is one that the lawyer would not approve. If the accused's choice on the question of a guilty plea is to be an informed one, the accused must act with full awareness of the alternatives, including any that arise from proposals made by the prosecutor.
Id.

[49] See Defense Function Standards, supra note 17, Standard 4-6.2(a); Pleas of Guilty Standards, supra note 17, Standard 14-3.2(a), (b). The ethical duty to convey and advise about a plea offer was also contained in the 1969 Model Code of Professional Responsibility that antedated the Model Rules. See, e.g., Model Code of Prof'l Responsibility EC 7-7 (1980) ("A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.").

[50] See cases cited supra note 13; see also State v. Donald, 10 P.3d 1193, 1198 (Ariz. Ct. App. 2000); People v. Perry, 68 P.3d 472, 477 (Colo. App. 2002); Cottle v. State, 733 So. 2d 963, 966 (Fla. 1999); Lloyd v. State, 373 S.E.2d 1, 2-3 (Ga. 1988); People v. Ferguson, 413 N.E.2d 135, 138 (Ill. App. Ct. 1980); Lyles v. State, 382 N.E.2d 991, 993-94 (Ind. Ct. App. 1978); People v. Alexander, 518 N.Y.S.2d 872, 879 (N.Y. 1987); State v. Simmons, 309 S.E.2d 493, 497 (N.C. Ct. App. 1983); Harris v. State, 875 S.W.2d 662, 665 (Tenn. 1994); Hanzelka v. State, 682 S.W.2d 385, 387 (Tex. Ct. App. 1984); Becton v. Hun, 516 S.E.2d 762, 766 (W. Va. 1999).

[51] See Model Rules of Prof'l Conduct R. 1.2(a) (a lawyer "must abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify"); id. R. 1.4(a)(1) (a lawyer must "promptly inform the client of any decision or circumstance with respect to which the client's informed consent ... is required by these rules"); id. R. 1.4(b) (a lawyer must "explain a matter to the extent reasonably necessary to permit the client to make informed decisions"). The first example in the commentary to Rule

1.4 of this duty to inform the client is that "a lawyer who receives from opposing counsel ... a proffered plea bargain in a criminal case must promptly inform the client of its substance." Id. R. 1.4 cmt. 2 (matters are "fundamental" or "substantive" because they are highly personal or derive from constitutional guarantees).

[52] See Defense Function Standards, supra note 17, Standard 4-5.2(a). The commentary to Standard 4-5.2 explains that "because of the fundamental nature of decisions such as these, so crucial to the accused's fate, the accused must make the decisions himself or herself." Id.

[53] See Pleas of Guilty Standards, supra note 17, Standard 14-3.2(b); see also Defense Function Standards, supra note 17, Standard 4-6.1(b) ("Under no circumstances should defense counsel recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed, including analysis of controlling law and the evidence likely to be introduced.").

[54] See Pleas of Guilty Standards, supra note 17, Standard 14-3.2(b).

[55] See id. Standard 14-1.4(c) ("The court should advise the defendant to consult with defense counsel if the defendant needs additional information concerning the potential consequences of the plea."). The commentary to this Standard notes that a similar provision was contained in the Uniform Rules of Criminal Procedure, promulgated in 1987. See Unif. R. Crim. P. 444(b)(2) (1987) (court "may not accept the plea if it appears that the defendant has not had the effective assistance of counsel").

[56] Pleas of Guilty Standards, supra note 17, Standard 14-3.2 cmt.

[57] See Prosecution Function Standards, supra note 17, Standard 3-4.1(c).

[58] Id., cmt.

[59] The term "collateral consequences" has become a familiar term describing the legal penalties and disabilities to which people are exposed when they plead guilty to a crime, though the term "status-generated penalties" might be more apt and legally precise. See Parker v. Ellis, 362 U.S. 574, 593-94 (1960) (Warren, C.J., dissenting) ("Conviction of a felony imposes a status upon a person which not only makes him vulnerable to future sanctions through new civil disability statutes, but which also seriously affects his reputation and economic opportunities."). The Padilla Court cast doubt on the usefulness of the term "collateral" to describe these penalties for purposes of the Sixth Amendment. See 130 S. Ct. at 1481 ("We ...have never applied a distinction between direct and collateral consequences to define the scope of constitutionally 'reasonable professional assistance.'"). Thus, the term is used in this Article for descriptive purposes only, or because it is used in existing ABA Standards.

[60] The 1981 Criminal Justice Standards on the Legal Status of Prisoners contained a section on "Civil Disabilities of Convicted Persons." See Legal Status of Prisoners, ABA Criminal Justice Section, http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_ standards_prisoners_status.html (last visited Dec. 29, 2011). Because, however, those Standards contemplated that such "disabilities" would be imposed on a case-by-case basis, as opposed to automatically upon conviction, there was no connection with guilty pleas or

sentencing. Twenty years before, the drafters of the Model Penal Code had been more prescient in seeing that link. See Margaret Colgate Love, Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code, 30 Fordham Urb. L.J. 1705, 1711-13 (2003) (describing § 306.6 of the 1962 Model Penal Code).

[61] See Pleas of Guilty Standards, supra note 17, Standard 14-3.2(f).

[62] Id., cmt.

[63] Id.

[64] Id.

[65] See Pleas of Guilty Standards, supra note 17, Standard 14-1.4(c) ("The court should also advise the defendant that by entering the plea, the defendant may face additional consequences including but not limited to ... if the defendant is not a United States citizen, a change in the defendant's immigration status.").

[66] Id. Standard 14-3.2 cmt.

[67] See ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons 19-2.3(f) (3d ed. 2004) (the court should "ensure, before accepting a plea of guilty, that the defendant has been informed of collateral sanctions made applicable to the offense ... by confirming on the record that defense counsel's duty of advisement under Standard 14-3.2(f) has been discharged").

[68] See supra note 51; see also Jones v. Barnes, 463 U.S. 745, 745, 751 (1983) (recognizing that decisions about fundamental matters, including decision to plead guilty, are reserved for the defendant).

[69] See Pleas of Guilty Standards, supra note 17, Standard 14-3.2 cmt.

[70] See Margaret Colgate Love, Collateral Consequences after Padilla v. Kentucky: From Punishment to Regulation, 30 St. Louis U. Pub. L. Rev. (forthcoming 2012) [hereinafter Love, Punishment to Regulation] (criticizing the collateral consequences doctrine as applied by the courts before Padilla, based on a failure to differentiate the institutional advisement roles of court and counsel).

[71] The trend noted in the 1999 Pleas of Guilty Standards has accelerated in the years since the terrorist attacks of 9/11. See supra note 62. See generally Margaret Colgate Love, Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act, 54 How. L.J. 753, 770-74 (2011) (describing expanded scope and severity of collateral penalties in federal and state law in past two decades). In a NIJ-funded compilation of collateral consequences in every U.S. jurisdiction, the American Bar Association has tentatively identified thousands of laws and regulations imposing penalties based on conviction. See Gabriel J. Chin, Making Padilla Practical: Defense Counsel and Collateral Consequences at Guilty Plea, 54 How. L. Rev. 675, 686-86 (2011).

[72] See generally Jenny Roberts, Why Misdemeanors Matter, 45 U.C. Davis L. Rev. (2012) (forthcoming 2012) (describing how "minor criminal convictions lead to major collateral consequences"). In the past, in some jurisdictions misdemeanants were ineligible to apply for executive clemency on the theory that they had no need for this relief. Today, in recognition of the change in this situation, many state clemency dockets include a large proportion of applications from misdemeanants. See generally Margaret Colgate Love, Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide (2008), available at http://www.sentencingproject.org/detail/publication.cfm?publication_id=115 (providing state-by-state data on the frequency of clemency grants).

[73] See Love, Punishment to Regulation, supra note 70.

[74] In functioning as a "checklist," the Standards must steer a course between "broad outline" and "detailed prescriptions" that "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." Strickland v. Washington, 466 U.S. 668, 688-89 (1984); see Bobby v. Van Hook, 130 S. Ct. 13, 17 (2009). Too little detail makes the Standards unhelpful as practice guidance, and too much detail makes them unenforceable by courts. A revision of the Defense Function Standards underway at the time of this writing would seem to present an opportune vehicle for development of such a checklist. The general desirability of checklists to help professionals navigate complex situations is described in Atul Gawande, The Checklist Manifesto: How to Get Things Right (2009).

[75] Pleas of Guilty Standards, supra note 17, Standard 14-3.2(f) requires identification and advisement about collateral consequences "[t]o the extent possible." The Collateral Sanctions Standards require that jurisdictions should "collect, set out or reference all collateral sanctions in a single chapter of the jurisdiction's criminal code." Collateral Sanctions Standard 19-2.1; see also Collateral Sanctions Standard 19-2.3(a) (providing that the court should "ensure, before accepting a plea of guilty that the defendant has been informed of collateral sanctions made applicable to the offense or offenses of conviction under the law of the state or territory where the prosecution is pending, and under federal law."). The commentary to Collateral Sanctions Standard 19-2.3 provides that "[c]ollection of applicable collateral sanctions pursuant to Standard 19-2.1 will make it possible for lawyers to give full advice in all cases. Thus, the contingency in Standard 14-3.2(f) that qualifies defense counsel's duty would no longer pertain." The inventory required by Standard 19-2.1 will be confined to statutory and regulatory consequences, so that defense counsel must question a client closely about sanctions that may be imposed by private contract.

[76] For example, Pleas of Guilty Standards, supra note 17, Standard 14-3.2(e) requires that "[a]t the outset of a case and whenever the law, nature and circumstances of the case permit, defense counsel should 'explore the possibility' of a diversion of the case from the criminal process." A similar requirement is contained in Defense Function Standards, supra note 17, Standard 4-6.1(a). See Pleas of Guilty Standards, supra note 17, Standard 14-4.1 (providing that diversion may be appropriate based on "special characteristics or difficulties of the offender") (citing National District Attorneys Association, National Prosecution Standards, § 44.4(b) (2d ed. 1991)). There are other dispositions that may avoid conviction and thus collateral consequences. See Margaret Colgate Love, Alternatives to Conviction: Deferred Adjudication as a Way of Avoiding Collateral Consequences, 22 Fed. Sent. Rpt. 6 (2009). Certain convictions or sentences may avoid particular collateral consequences. Id.

[77] See supra note 74; see also National District Attorneys Association, National Prosecution Standards 4-1.3 (3d ed. 2009) (providing that "undue hardship ... to the accused" can be a basis not to charge or to agree to a particular plea);

U.S. Attorney's Manual 9-28.1000(A) (1997) (stating that with corporate defendants, "[p]rosecutors may consider the collateral consequences" in determining "whether to charge" and "how to resolve" the case).

[78] For example, Collateral Sanctions Standard 19-2.4 ("Consideration of collateral sanctions at sentencing" provides that a "legislature should authorize the sentencing court to take into account, and the court should consider, applicable collateral sanctions in determining an offender's overall sentence.").

[79] The Collateral Sanctions Standards provide several opportunities to avoid or mitigate collateral sanctions. Standard 19-2.4 provides that a court at sentencing should be authorized to take them into account in determining the overall sentence. Standard 19-2.5 provides that a court (or administrative agency) should be authorized "to enter an order waiving, modifying, or granting timely and effective relief from any collateral sanction imposed by the law of that jurisdiction." There will be occasions when "timely and effective" relief can only be granted at sentencing itself, as where a defendant sentenced to probation will otherwise lose his job or home or retirement income. The availability of relief from collateral sanctions in post-conviction proceedings has been held relevant in constitutional challenges to their imposition in the first instance. See State v. Letalien, 985 A.2d 4, 26 (Me. 2009) ("The retroactive application of the lifetime registration requirement and quarterly in-person verification procedures of SORNA of 1999 to offenders originally sentenced subject to SORNA of 1991 and SORNA of 1995, without, at a minimum, affording those offenders any opportunity to ever be relieved of the duty as was permitted under those laws, is, by the clearest proof, punitive, and violates the Maine and United States Constitutions' prohibitions against ex post facto laws."); Doe v. Sex Offender Registration Bd., 882 N.E.2d 298, 309 (Mass. 2008) ("[T]he retroactive imposition of the registration requirement without an opportunity to overcome the conclusive presumption of dangerousness that flows solely from Doe's conviction, violates his right to due process under the Massachusetts Constitution.").

[80] See Chin, supra note 71, at 678 ("It is pointless to impose a duty on defense counsel that cannot be satisfied, either because it expects herculean research efforts, or because it will accept superficial advice based on moderate research."). In 2008, Congress directed the Department of Justice to carry out a nationwide survey of collateral consequences, a project now underway under the auspices of the American Bar Association. See supra note 71. It is expected that the ABA research project will create a comprehensive database of collateral consequences, though it will remain for particular jurisdictions to put this data into usable form, and it will have to be updated as new laws are passed and existing laws are amended.

[81] See, e.g., Calvert v. State, 342 S.W.3d 477, 491-92 (Tenn. 2011) (ineffective assistance in failure to warn client pleading guilty to sex offense about lifetime supervision requirement); State v. Fonville, 2011 Mich. App. LEXIS 140 (Mich. Ct. App. 2011) (same, concluding constitutionally defective performance when defense counsel failed to inform Fonville of the same sex offender registration requirement when pleading guilty to child enticement); Com. v. Abraham, 996 A.2d 1090 (Pa. Super. Ct. 2010), appeal granted, 9 A.3d 1133 (Pa. Nov. 30, 2010) (same, forfeiture of pension as a result of misdemeanor sex offense conviction); In re C.P.H., No. FJ-03-1313-02, 2010 WL 2926541 (N.J. Super. Ct. App. Div. Jul. 23, 2010) (same, lifetime supervision for juvenile who pled to sex offense). See generally Punishment to Regulation, supra note 70 (describing cases extending Padilla's holding to collateral consequences other than deportation).

[82] See supra notes 67-69; see also Love, Punishment to Regulation, supra note 70 (describing post-Padilla developments in due process case law).

[83] In April 2011, the Attorney General of the United States wrote to the attorneys general of all fifty states

"encourag[ing]" them "to evaluate the collateral consequences in [their] state[s]--and to determine whether those that impose burdens on people convicted of crime without increasing public safety should be eliminated." See, e.g., Letter from Attorney General Eric H. Holder, Jr. to Vermont Attorney General William H. Sorrell (Apr. 18, 2011), available at http://onlawyering.com/wp-content/uploads/2011/05/VT-Attorney-General-Sorrell.0001-1.pdf ("[G]ainful employment and stable housing are key factors that enable people with criminal convictions to avoid future arrest and incarceration."). The letter indicated that the Justice Department "intend[s] to conduct a similar review of federal collateral consequences identified in the American Bar Association study." Id.

[84] If Padilla requires competent counsel in connection with any guilty plea that triggers the penalty of deportation, it would extend the holding of Alabama v. Shelton, 535 U.S. 654, 658 (2002) ("A suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged." (quoting Argersinger v. Hamlin, 407 U.S. 25, 40 (2006))).

[85] See Defense Function Standards, supra note 17, Standard 4-6.1(b). See generally Roberts, supra note 72 (describing lack of misdemeanor representation guidance in standards for defense representation).

[86] In certain limited circumstances it may be in the client's interest to enter a plea at arraignment, as for example where detention may result in deportation without regard to conviction. In such a case, the record during the guilty plea colloquy should reflect that counsel has had an opportunity to fully investigate. Counsel should attempt to ensure that the plea is not to charges that necessarily result in deportation.

[87] See Love, Punishment to Regulation, supra note 70, at 36 ("Because the parties to plea negotiations must be able to deal with the immediate issues presented by the criminal case without the distractions represented by a defendant's concerns over status-generated penalties, Padilla will in time lead away from the punitive model illustrated by the pension forfeiture in Abraham toward an administrative law model, where penalties are reasonably related to the criminal conduct, and more flexibly applied. When prosecutors find it harder to craft acceptable plea offers because of collateral sanctions, when defendants are willing to risk going to trial to avoid them, and when judges are moved to set pleas aside because the agreed-upon deal later seems unfair, the system of collateral consequences that traps so many in a degraded social status must change.").

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