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24-P-372

Appeals Court

COMMONWEALTH vs. RICARDO LOPEZ.

No. 24-P-372.

Essex. January 6, 2025. – October 9, 2025.

Present: Englander, Hodgins, & Smyth, JJ.

Alien. Practice, Criminal, New trial, Assistance of counsel, Plea, Appeal. Breaking and Entering. Destruction of Property. Constitutional Law, Assistance of counsel. Due Process of Law, Assistance of counsel.

Complaint received and sworn to in the Lawrence Division of the District Court Department on July 26, 1999.

A motion for a new trial, filed on October 25, 2021, was heard by Kevin J. Gaffney, J., and considered by Mark A. Sullivan, J., and a motion for reconsideration also was considered by him.

Rachel Chunnha for the defendant.
Kristen Wekony Jiang, Assistant District Attorney, for the Commonwealth.

ENGLANDER, J. The defendant seeks a new trial based on alleged ineffective assistance of counsel. In 1999, the defendant, an undocumented immigrant, was charged with assault

and battery, breaking and entering in the nighttime with intent to commit a felony, and malicious destruction of property over \$250. Of these offenses, the latter two are considered "crimes of moral turpitude" under the immigration laws. Following a bench trial in District Court in 2000, the defendant was convicted of the breaking and entering charge, and the lesser included offense of malicious destruction of property under \$250.

Many years later, the defendant learned that his conviction of breaking and entering with intent to commit a felony foreclosed a path to permanent residency. This path had otherwise become available when the defendant's mother became a naturalized citizen, which occurred after his trial. In 2021 the defendant moved for a new trial, arguing (1) that trial counsel did not advise the defendant of the immigration consequences of a conviction, and in particular, that a conviction after trial could foreclose a specific path to permanent residency; and (2) that trial counsel did not advise the defendant of his right to appeal or file a notice of appeal.

A District Court judge denied the motion for a new trial, as well as a motion for reconsideration. The defendant presses his arguments again on appeal. The defendant's first argument regarding immigration consequences fails, as this case is controlled by Commonwealth v. Marinho, 464 Mass. 115, 128-130

(2013), in which the Supreme Judicial Court ruled, under similar circumstances, that the defendant in that case had not shown prejudice because he had not demonstrated a reasonable probability that he could have achieved the plea bargain he posited in his motion for a new trial. As to the failure to file a notice of appeal, we must remand the matter as to this issue to the District Court, which under the circumstances needed to hold an evidentiary hearing to determine whether the defendant received ineffective assistance regarding the appeal and if so, whether the defendant otherwise would have timely appealed from his convictions.

Background. The following facts are drawn from the limited record before us, which includes a portion of a police report, the defendant's affidavit, and trial counsel's unsworn statements in e-mail messages to motion counsel. The defendant did not submit an affidavit from trial counsel in connection with the motion for a new trial.¹

Per the defendant's affidavit, he is a Guatemalan national who entered the United States in 1995. It is undisputed that he entered unlawfully. In July of 1999, the defendant was arrested

¹ The defendant attempted to obtain an affidavit from trial counsel, who refused. It appears that trial counsel also refused to turn over his notes relating to his representation of the defendant, notwithstanding the applicable Rule of Professional Conduct. See Mass. R. Prof. C. 1.15A, as amended, 493 Mass. 1303 (2024).

and charged with assault and battery, breaking and entering in the nighttime with intent to commit a felony, and malicious destruction of property over \$250. The evidence in the record differs as to the events leading to the defendant's arrest. According to the portion of the police report in the record, two men (the car owners) flagged down an officer to report that someone had broken into their car. The car owners were eating dinner when they heard a loud noise; on leaving the restaurant, they found several men standing next to their car, which had a broken window. The car owners confronted the men, and a fight ensued. The remainder of the arrest report is not in the record, but evidently the defendant was arrested as a result of this altercation.

In his affidavit, the defendant admits that he was present at this incident, but avers that it was another man in his group who broke the car window. The defendant also avers that the owners of the car started fighting him and his group, and that he acted in self-defense.

Regarding the assistance of counsel, the defendant states the following: that he was appointed counsel, that he told trial counsel that he was innocent, and that trial counsel gave him the option of pleading guilty or going to trial. The defendant further avers that trial counsel never told him that the case would result in immigration consequences. Trial

counsel, on the other hand, states in his e-mail messages that he advised the defendant that "more likely than not" the defendant would be deported, denied readmission, and denied citizenship.

The case was tried, jury waived, in February of 2000. Per the defendant's affidavit, the owner of the car testified and accused the defendant at trial. Ultimately the defendant was acquitted of assault and battery, convicted on the breaking and entering charge, and convicted of the lesser included offense of malicious destruction of property under \$250. He was sentenced to six months of probation.

Twenty years later, the defendant sought to become a permanent resident of the United States. This was a possibility because the defendant's mother had become a naturalized citizen; motion counsel represented that the defendant's mother's naturalization occurred after trial. The defendant asserts that on seeking the advice of immigration counsel, he learned that his breaking and entering conviction rendered him inadmissible to the United States, and therefore ineligible for permanent residency.

In October of 2021, the defendant moved for a new trial with respect to his convictions. Among the grounds therefor were that the defendant was allegedly deprived of effective assistance of counsel, because (1) trial counsel did not

negotiate an "immigration-safe" plea, and did not inform the defendant of the immigration consequences of a guilty verdict; and (2) trial counsel failed to advise him regarding the filing of a notice of appeal. After a nonevidentiary hearing, the motion judge, who was not the trial judge, denied the motion. The defendant moved for reconsideration, attaching to his motion e-mail messages between motion counsel and trial counsel. This motion was also denied.

Discussion. 1. Immigration consequences. The defendant first argues that in 2000, prior to trial, trial counsel should have advised him that if he was convicted, certain convictions would render him inadmissible and prevent him from becoming a lawful resident of the United States, and that if later apprehended by Federal authorities, "his deportation would be mandatory, with no potential avenue for discretionary relief." The defendant further argues that he should have been advised that he could pursue a plea bargain that was (allegedly) "immigration-safe" -- in his case, by pleading guilty to lesser included offenses with respect to breaking and entering and malicious destruction of property.²

² The parties seem to agree, and we assume without deciding, that the breaking and entering and malicious destruction of property charges that the defendant faced constituted crimes of moral turpitude under the immigration laws and accordingly carry negative immigration consequences. See 8 U.S.C. § 1227(a)(2)(A)(i)(II), as amended through September 30, 1996;

"We review the denial of a defendant's motion for a new trial for a significant error of law or other abuse of discretion." Commonwealth v. Torres, 495 Mass. 1008, 1010 (2024). However, "[w]hen, as here, the motion judge did not preside [at trial] . . . , we regard ourselves in as good a position as the motion judge to assess the . . . record." Commonwealth v. Martinez, 86 Mass. App. Ct. 545, 550 (2014), quoting Commonwealth v. Petetabella, 459 Mass. 177, 181 (2011). The motion judge has the discretion to deny a new trial motion on the affidavits, where no substantial issue is raised. See Commonwealth v. Denis, 442 Mass. 617, 629 (2004); Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 394 (2012), quoting Mass. R. Crim. P. 30 (c) (3), as appearing in 435 Mass. 1501 (2001). However, "[g]enerally, 'where a substantial issue is raised and is supported by a substantial evidentiary showing, the judge should hold an evidentiary hearing,'" allowing the judge to make the required factual findings to decide the motion. Gordon,

Da Silva Neto v. Holder, 680 F.3d 25, 27 (1st Cir. 2012); Wala v. Mukasey, 511 F.3d 102, 106 (2nd Cir. 2007).

Generally speaking, two such consequences are deportation and inadmissibility to the United States. See 8 U.S.C. §§ 1182(a)(2)(A)(i), as amended through December 3, 1999, 1227(a)(2)(A)(i). The defendant alleges that had he pleaded guilty to certain lesser included offenses, he would have fallen within exceptions to both the deportation and admissibility provisions.

supra at 394-395, quoting Commonwealth v. Stewart, 383 Mass. 253, 260 (1981).

To show ineffective assistance of counsel, under the familiar Saferian standard the defendant must make two showings: that counsel's performance fell "measurably below that which might be expected from an ordinary fallible lawyer," and that counsel's performance "likely deprived the defendant of an otherwise available, substantial ground of defence." Marinho, 464 Mass. at 123, quoting Commonwealth v. Saferian, 366 Mass. 89, 96 (1974). In analyzing the first Saferian prong, we look to the "professional standards of the legal community." Commonwealth v. Lavrinenko, 473 Mass. 42, 51 (2015), quoting Commonwealth v. Clarke, 460 Mass. 30, 45 (2011), abrogated in part by Chaidez v. United States, 568 U.S. 342 (2013). "The weight of prevailing professional norms supports the view that counsel must advise [his or] her client regarding the risk of deportation," Lavrinenko, supra, quoting Padilla v. Kentucky, 559 U.S. 356, 367 (2010), whether resulting from a guilty plea or conviction after trial; however, the extent of this obligation "is tied to the clarity of the law regarding the immigration consequences of [the disposition]," Commonwealth v. Taron T., 104 Mass. App. Ct. 219, 226 (2024). As to the second Saferian prong, where, as here, the defendant alleges that he would have pleaded guilty instead of going to trial, "the

defendant must show a reasonable probability that the result of a plea would have been more favorable than the outcome of the trial." Marinho, supra at 129. "In particular, the defendant must demonstrate a reasonable probability that the prosecution would have made an offer, that the defendant would have accepted it, and that the court would have approved it." Id.

Turning to the case at bar, we note first that we have serious doubt that the defendant could show that counsel fell "measurably below" professional standards by failing to give the advice that the defendant now posits. Defense counsel's advice in this case was given in the year 2000, eleven years before Padilla was decided. There is no evidence in the record as to the advice an "ordinary fallible" defense attorney would have been expected to give at that time. See Lavrinenko, 473 Mass. at 51. Moreover, as we discuss in more detail infra, the defendant's theory of how he was prejudiced by ineffective assistance posits that defense counsel was required to construct, to avoid supposed immigration consequences, a sophisticated plea-bargain structure that then needed to be (1) offered by the prosecutor, and (2) accepted by the defendant and the judge. We need not decide whether counsel's performance was ineffective, however, because we think it clear that the defendant has not met his burden as to prejudice.

Our analysis as to the second Saferian prong is controlled by the Supreme Judicial Court's decision in Marinho. In that case, the defendant was also convicted after trial. Marinho, 464 Mass. at 116. Prior to trial, counsel had provided no advice to the defendant (who was undocumented) as to the immigration consequences of an aggravated felony, and had not informed the defendant that the prosecution was interested in discussing a plea. Id. at 117, 125 n.13, 127. The court held that counsel was ineffective, but that the defendant could not show prejudice. Id. at 128-133. Driving the court's decision was that the defendant could not show that there was a plea bargain available that could have avoided the immigration result the defendant later faced:

"The defendant offered no evidence that the prosecutor would have offered him a favorable plea bargain, or that the judge would have accepted one. Evidence that there was no plea negotiation also does not establish that there was any real opportunity to avoid the immigration consequences of a conviction, particularly for an undocumented person. The reality of the defendant's status as an undocumented person living in the United States was that he was deportable per se on account of his unlawful status. . . . Although plausible, we have been shown no evidence that the defendant's criminal activity made him a more likely target for deportation."

Id. at 130-131.

In the present case, just as in Marinho, the defendant has not shown prejudice. Indeed, this case is nearly identical to Marinho, and the one difference, discussed below, does not

change the result. The defendant has not adduced any evidence that the prosecutor would have offered, or that the judge would have accepted, a plea bargain that would have resulted in the lack of immigration consequences that the defendant now wishes to achieve. See Marinho, 464 Mass. at 130. Just as with the defendant in Marinho, the defendant here was undocumented and accordingly he was both inadmissible, and "per se" subject to removal, before any trial had occurred. See 8 U.S.C.

§ 1182(a)(6)(A)(i), as amended through December 3, 1999; Marinho, supra. Also as in Marinho, the defendant here has not shown that his convictions put him at any higher risk of removal than the risk he already was facing, given that he was undocumented. See Marinho, id. at 131.

The sole difference between this case and Marinho is that here the defendant has identified one immigration consequence that a favorable plea allegedly could have avoided -- namely, that conviction of a crime of moral turpitude rendered the defendant ineligible for a form of discretionary relief from inadmissibility known as an unlawful presence waiver, available to the children of United States citizens.³ See 8 U.S.C.

³ The defendant also makes the conclusory assertion that his conviction in 2000 rendered him ineligible for discretionary relief from deportation (as opposed to inadmissibility). However, in his brief the defendant did not identify any program for discretionary relief from deportation that he would be eligible for, but for his conviction.

§ 1182(a)(9)(B)(v). Put differently, the defendant contends that if, rather than going to trial, he had instead pleaded guilty to (1) assault and battery, (2) the lesser included offense of malicious destruction of property under \$250, and (3) the lesser included offense of breaking and entering with the intent to commit a misdemeanor, he would still have been eligible in 2021 for the unlawful presence waiver.

We pause here to note the range of unlikely assumptions that are buried in this argument -- in particular, that under the professional standards of the time, defense counsel was required to learn and to advise the defendant of a possible plea bargain structure that allegedly would have preserved the possibility to obtain this unlawful presence waiver, even though the defendant was a deportable, undocumented immigrant with no relatives who were then United States citizens. The defendant's theory of what was required of defense counsel in terms of immigration advice is accordingly, farfetched -- the defendant offers no expert opinion, or even argument, as to why such

In a postargument letter, the defendant references one such program: that, allegedly, having affirmatively sought asylum, he could request asylum as a defense against removal. This argument was not made to the motion judge, however, nor was it made in the briefs on appeal. See Commonwealth v. Graziano, 96 Mass. App. Ct. 601, 607 n.10 (2019) (argument "not raised in the trial court or in the defendant's appellate brief . . . is waived").

advice would have been required (or considered) given the time and the circumstances.⁴

⁴ The dissent contends that defense counsel failed to meet what the dissent asserts were "the professional standards of legal representation of the time." Post at . The dissent echoes the defendant's argument that defense counsel was required as a matter of law to advise the defendant not only that certain convictions would likely render him deportable (although, he was already deportable), but also that the convictions would render the defendant "inadmissible" in the future. The dissent also adopts the defendant's argument that defense counsel was required to construct a possible plea bargain that would have no immigration consequences, and to advise the defendant of such a plea. Post at .

The principal problem with the dissent's exegesis is that it finds no support in the record. The law that occupies the dissent is immigration law, not criminal law; immigration law is complicated, and it is not the principal discipline of a criminal defense lawyer -- certainly not in the year 2000. The motion for a new trial did not include an expert report regarding a defense lawyer's professional standards at the time, nor is there case law that addresses, as of that time period, the particular requirements for immigration advice that the dissent now seeks to create (i.e., the purported obligation to construct an "immigration-safe" plea for an undocumented immigrant). The dissent is instead engaged in a post hoc effort to impose its views of what counsel should have done, as well as its post hoc views of the plea bargains to which a prosecutor might have agreed. It is hindsight reasoning, unsupported by record facts.

When we address motions such as this, claiming ineffective assistance of counsel with respect to advice given over twenty years before, we should bear in mind that the ultimate question is whether a particular lawyer fell "measurably below" professional standards. The defendant has the burden to provide record facts showing ineffectiveness at that time, and prejudice at that time. The defendant did not do so here. See Commonwealth v. Drew, 447 Mass. 635, 641 (2006), cert. denied, 550 U.S. 943 (2007) (counsel's performance must be evaluated "at the time of the alleged professional negligence, and not with the advantage of hindsight"). See also Strickland v. Washington, 466 U.S. 668, 689 (1984) ("A fair assessment of

However, even if we assume that counsel's failure to advise of this potential consequence and to structure a possible plea bargain could constitute ineffective assistance under the circumstances, the defendant has not shown prejudice here. The defendant has not shown a "reasonable probability" that he, the prosecution, and the judge would have agreed to a guilty plea that would have preserved the defendant's eligibility for an unlawful presence waiver. See Marinho, 464 Mass. at 129. As previously stated, there is no evidence that the prosecution would have agreed to such a plea. Furthermore, the defendant has not shown a reasonable probability that he would have accepted such a plea at the time of trial.⁵ See id. Cf.

attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time").

⁵ The dissent attempts to distinguish Marinho, pointing out (1) that in Marinho, trial counsel cooperated with the motion for a new trial, see Marinho, 464 Mass. at 128-129, and (2) that the Marinho court concluded that even if the defendant had pleaded guilty to simple assault rather than assault and battery causing serious bodily injury, he might have suffered the same immigration consequence of deportation, see id. at 131-132. Post at . Neither point is a material distinction. Defense counsel in Marinho did not provide better advice than counsel here, such that prejudice would have been less likely: counsel in Marinho gave no advice on immigration consequences and did not discuss potential plea bargains with the defendant; yet despite counsel's ineffective assistance, the court found no prejudice. See 464 Mass. at 122-123, 128. Moreover, the thrust of Marinho is that the defendant was undocumented and thus "deportable per se," and that the defendant's new trial submissions failed to provide supported, credible evidence "that

Lavrinenko, 473 Mass. at 55 (in context of guilty plea, to show prejudice, defendant must show reasonable probability that reasonable person would have gone to trial under the circumstances). The defendant has put forth evidence that remaining in the United States would have been important to him at the time -- namely, that his wife and child had recently moved to be with him. But at the time of trial the defendant was already deportable and not eligible for an unlawful presence waiver, as his mother was not then a citizen; moreover, the defendant's position was that he was innocent and that he wanted to go to trial. Accordingly, regardless of the importance that the defendant placed on immigration consequences in general, he has not shown a reasonable probability that he would have pleaded guilty to the hypothetical, "immigration-safe" plea.

2. Failure to advise of appeal and to file notice of appeal. The defendant also argues that trial counsel was ineffective by not discussing an appeal with him and by not filing a notice of appeal after the defendant's convictions. As to this issue, we are constrained to remand this matter for an evidentiary hearing. There is no indication in the record that a notice of appeal was ever filed. The defendant averred, in

there was any real opportunity to avoid the immigration consequences of a conviction, particularly for an undocumented person." Id. at 130. As in Marinho, the motion here "fails for lack of proof." Id. at 123.

his affidavit, that his lawyer "never even brought [the possibility of appeal] up." There is no affidavit from trial counsel, but in his e-mail messages he stated that it was his practice to seek an appeal only when he identified "an error of law was made," and that he "made note that [he] questioned an appeal in this case."

If counsel never discussed the possibility of an appeal with his client, that may constitute ineffective assistance. See Roe v. Flores-Ortega, 528 U.S. 470, 479-480 (2000); Commonwealth v. Trussell, 68 Mass. App. Ct. 452, 457 & n.5 (2007). Cf. Commonwealth v. Fabian F., 83 Mass. App. Ct. 394, 398-400 (2013). Moreover, such a failure, if ineffective, would fall into a category of ineffective assistance where "counsel's shortcomings during the appellate process have altogether deprived a defendant of review on direct appeal." Commonwealth v. Alvarez, 69 Mass. App. Ct. 438, 441 (2007). In such a case, our cases state that "the defendant is not required to specify or argue the appellate issues that he would raise were his appeal reinstated." Id. Rather, if the defendant shows (1) that counsel was ineffective as to the defendant's appellate rights, either because counsel never discussed with the defendant the possibility of appeal when the ordinary fallible lawyer would have done so, or for some other meritorious reason, and (2) that the defendant would have pursued an appeal, if

properly advised, then the defendant must be allowed to pursue his appellate rights (through an appeal or motion for a new trial). See White v. Commonwealth, 479 Mass. 1023, 1024-1026 (2018), S.C. 496 Mass. 1003 (2025); Alvarez, supra at 441, 442 n.1, 443 n.4; Trussell, supra at 457 & n.5. See also Roe, supra at 476-480, 484.

Applying these principles to the case at bar admits of some difficulty, because the operative facts occurred over twenty years ago. The first issues before the motion judge are factual questions: was counsel ineffective as to the right of appeal, and would the defendant have appealed if counsel had not been ineffective. As to those issues, we note that the defendant has shown no evidence that he sought, or even considered, an appeal over the past twenty-plus years. However, while relevant, the passage of time alone is not dispositive of whether the defendant would have pursued an appeal. Here the defendant alleged, in his affidavit, that his lawyer never discussed an appeal with him, and that if he knew he could appeal, he would have. Furthermore, trial counsel stated in his e-mail messages that he "questioned an appeal in this case." The defendant has made a sufficient factual showing to require an evidentiary hearing as to this issue, and we remand solely for that purpose.

We recognize the further, significant practical problems if the defendant is ultimately allowed to pursue an appeal, given

that apparently there is no transcript of the trial, or any way to create a verbatim transcript at this point. We emphasize that the only remedy we are recognizing at this point is the possible right to pursue an appeal; it would remain the defendant's burden to demonstrate that prejudicial error occurred at trial. The delay in pursuing the appeal is not to be visited on the Commonwealth.

Conclusion. So much of the order denying the motion for a new trial and order denying the motion for reconsideration that were entered as to trial counsel's alleged ineffectiveness regarding the defendant's right to an appeal and counsel's failing to file a notice of appeal are vacated. The orders are otherwise affirmed. The case is remanded to the District Court for further proceedings consistent with this opinion.

So ordered.

SMYTH, J. (concurring in part and dissenting in part). I concur with the court that the case should be remanded for an evidentiary hearing and further findings as to whether trial counsel ever discussed the possibility of appeal with the defendant. However, I dissent from the court's conclusion that the judge properly denied the defendant's motion for a new trial as it pertained to trial counsel's failure to provide adequate immigration warnings to the defendant.

Instead, I conclude that the defendant demonstrated that his trial counsel's performance was deficient under the protections of both the United States Constitution and Massachusetts Declaration of Rights because trial counsel failed to advise the defendant that a conviction on two of the charged offenses would adversely impact the defendant's ability to lawfully remain in the United States. As such, the defendant satisfied the first, or performance, prong of Commonwealth v. Saferian, 366 Mass. 89, 96 (1974).

Concerning Saferian's prejudice prong, trial counsel's failure to correctly warn the defendant of the clear immigration consequences of a conviction caused the defendant to forgo seeking an immigration-safe plea. The defendant instead proceeded to trial unaware of the immigration consequences that a conviction would have on him and his family. The defendant's submissions established the existence of a substantial issue as

to prejudice, requiring an evidentiary hearing. Specifically, the defendant is entitled to an evidentiary hearing at which he would bear the burden to prove a reasonable probability that he would have successfully negotiated a plea bargain had he known of the adverse immigration consequences, and further, that the result of the plea would have been more favorable to him, as to adverse immigration consequences, than the outcome of his trial. See Commonwealth v. Marinho, 464 Mass. 115, 129-130 (2013); Commonwealth v. Clarke, 460 Mass. 30, 47-48 (2011), abrogated in part by Chaidez v. United States, 568 U.S. 342 (2013). Thus, I would remand for that additional purpose.

Background. This case exemplifies the difficulties defendants moving for a new trial sometimes experience when seeking assistance from prior counsel. See, e.g., Commonwealth v. Miller, 101 Mass. App. Ct. 344, 352 (2022) ("we have recognized that prior counsel may repeatedly refuse to respond to communications from successor counsel or may refuse to provide an affidavit despite having favorable information to assist the former client"). In preparation for the defendant's motion for a new trial, motion counsel contacted trial counsel to request an affidavit describing trial counsel's immigration advice to the defendant and information regarding the lack of a notice of appeal. Trial counsel refused to provide an affidavit or assist in any other manner such as providing his case file to

motion counsel. When motion counsel sent an e-mail message to trial counsel after the defendant's motion was denied, again requesting trial counsel's assistance in documenting what advice trial counsel had provided at the time of his trial, trial counsel replied that he would not assist motion counsel. After motion counsel advised trial counsel that it was important for trial counsel to "satisfy [his] professional obligations by cooperating in this [motion for a new trial] process," trial counsel responded as follows:

"I can tell you that my policy at that time was to tell clients that if they were charged with a drug crime, a crime of violence, or a crime involving moral turpitude, they would more likely than not be deported, denied readmission to the country, or denial of citizenship. I advised this client of that fact in this case."

In contrast, the defendant averred,

"My lawyer never told me anything about this case being a problem for my immigration status or immigration consequences related to my case. I would remember because this was important to me. . . . The lawyer could have negotiated a better deal if he knew the immigration consequences. I would have asked my attorney to get a plea deal that did not stop me from getting my green card. I would rather have plead to something that allowed me to get a visa later than risk a trial."

In his e-mail messages, trial counsel also informed motion counsel that "plea recommendations were discussed" during his meetings with multiple assistant district attorneys who handled the case. However, trial counsel did not state whether he relayed any of the plea discussion information to the defendant.

Finally, trial counsel refused to provide his notes or his "work product" from this case to motion counsel.¹

Discussion. "A judge 'may grant a new trial at any time if it appears that justice may not have been done.' The judge must make 'such findings of fact as are necessary to resolve the defendant's allegations of error of law.'" Commonwealth v. Grace, 397 Mass. 303, 305 (1986), quoting Mass. R. Crim. P. 30 (b), as appearing in 435 Mass. 1501 (2001). Because the motion judge was not the trial judge and did not conduct an evidentiary hearing, we review the motion judge's decision to not grant an evidentiary hearing de novo, granting no special deference to their conclusion. See Commonwealth v. Bastos, 103 Mass. App. Ct. 376, 381-382 (2023). In deciding a motion for a new trial, a motion judge must first decide whether the defendant's motion and affidavits present a "substantial issue." Commonwealth v. Lys, 481 Mass. 1, 5 (2018), quoting Mass. R. Crim. P. 30 (c) (3). "If a motion judge finds that they do present a substantial issue, then the judge must hold an evidentiary hearing." Lys, supra at 6.

In determining whether a substantial issue exists, "a judge considers the seriousness of the issues raised and the adequacy

¹ The defendant included the above referenced e-mail messages in his motion to reconsider the denial of his motion for a new trial.

of the defendant's showing on those issues." Commonwealth v. Welch, 487 Mass. 425, 445 (2021). Given that a claim of ineffective assistance of counsel "readily qualifies as a serious issue," the remaining question here is the adequacy of the defendant's showing. Commonwealth v. Denis, 442 Mass. 617, 629 (2004). Regarding the adequacy of the defendant's showing, "the defendant's submissions 'need not prove the [motion's] factual premise . . . but they must contain sufficient credible information to cast doubt on the issue.'" Welch, supra, quoting Commonwealth v. Upton, 484 Mass. 155, 162 (2020). A factor relevant to a judge's determination whether to hold an evidentiary hearing is if "a hearing would have provided the judge with additional information relevant to the motion." Commonwealth v. DeVincent, 421 Mass. 64, 68 (1995).

In Padilla v. Kentucky, the United States Supreme Court concluded that defense counsel's failure to advise a client that a clear consequence of his guilty plea would be presumptively mandatory deportation constituted ineffective assistance of counsel. 559 U.S. 356, 369-374 (2010). When determining whether counsel has been constitutionally ineffective in providing advice concerning immigration consequences consistent with Padilla, the question is "whether there has been serious incompetency, inefficiency, or inattention of counsel -- behavior of counsel falling measurably below that which might be

expected from an ordinary fallible lawyer -- and, if that is found, then, typically, whether it has likely deprived the defendant of an otherwise available, substantial ground of defence." Clarke, 460 Mass. at 45, quoting Saferian, 366 Mass. at 96.

1. Trial counsel's performance. "It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so 'clearly satisfies the first prong of the Strickland analysis.'"² Clarke, 460 Mass. at 43, quoting Padilla, 559 U.S. at 371. The defendant argues that trial counsel, by "communicating that deportation and inadmissibility were probabilistic consequences of a conviction," failed to properly warn the defendant, a noncitizen, of a conviction's near-certain adverse immigration consequences, including being rendered for mandatory deportation

² The Supreme Court in Strickland v. Washington, 466 U.S. 668, 687 (1984), articulated the two steps required for establishing ineffective assistance of counsel:

"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense."

See Clarke, 460 Mass. at 37 ("satisfying the Saferian standard necessarily satisfies Strickland").

and the loss of discretionary relief from removal.³ The Commonwealth counters that ordinary fallible counsel was not required to provide any advice to the defendant concerning adverse immigration consequences of a criminal conviction, including deportation, inadmissibility, or the loss of access to discretionary relief.

In order to comply with Padilla and its progeny, the ordinary fallible criminal defense attorney must first make a reasonable inquiry of their client's history, including whether the client is a citizen of the United States. See Commonwealth v. Lavrinenko, 473 Mass. 42, 51-52 (2015); Clarke, 460 Mass. at 46 ("fail[ing] to ascertain that the defendant was not a United States citizen may be sufficient to satisfy the first prong of the Saferian standard"). "Where a criminal defense attorney learns that his or her client is a noncitizen, the attorney must make further reasonable inquiry of the client to determine, where possible, the client's immigration status." Lavrinenko, supra at 52.

Once counsel has determined their noncitizen client's circumstances, they are required to advise their client for each charge that either pleading guilty or going to trial may carry a

³ This dissent uses the term "noncitizen" as equivalent to the statutory term "alien," 8 U.S.C. § 1101(a)(3). See, e.g., Santos-Zacaria v. Garland, 598 U.S. 411, 414 n.1 (2023).

risk of adverse immigration consequences. See Marinho, 464 Mass. at 124-126. When the immigration consequences of a conviction are clear, counsel has the duty to give correct advice concerning those consequences. See Commonwealth v. DeJesus, 468 Mass. 174, 180 (2014), citing Padilla, 559 U.S. at 369; Commonwealth v. Gordon, 82 Mass. App. Ct. 389, 396 (2012), citing Padilla, supra.

In Massachusetts, an attorney's obligations to advise criminal defendants of immigration consequences as set forth in Padilla were applicable well before the defendant was convicted in 2000. See Commonwealth v. Sylvain, 466 Mass. 422, 424 (2013) (Supreme Judicial Court concluding, "Sixth Amendment [to the United States Constitution] right enunciated in Padilla was not a 'new' rule and, consequently, defendants whose State law convictions were final after April 1, 1997, may attack their convictions collaterally on Padilla grounds").

Here, the defendant's trial counsel failed to provide constitutionally effective assistance as he did not sufficiently advise the defendant on how resolution of his criminal charges would impact his ability to remain in the United States. See Commonwealth v. Taron T., 104 Mass. App. Ct. 219, 226 (2024). Had trial counsel adequately inquired of the defendant's immigration status, he would have learned that the defendant was a noncitizen and that while temporarily inadmissible and subject

to removal from the United States, the defendant's status did not prohibit a future application for either naturalization or other legal status such as lawful permanent residence. On basic inquiry, trial counsel would have also learned that the defendant desired to stay in the United States to be with his family and was fearful of returning to the violence he encountered in his home country.

Given these circumstances, trial counsel should have, but failed to, advise the defendant on his deportation risk if convicted of the charges. Trial counsel's proffered advice concerning the defendant's deportation risk -- specifically, that the defendant would "more likely than not be deported" -- was inadequate given that it failed to convey that a conviction would leave the defendant with "virtually no avenue for relief from deportation," DeJesus, 468 Mass. at 181, and also would foreclose his ability to ever re-enter the United States without being rendered deportable.⁴ See DeJesus, *id.* at 181-182. See also Marinho, 464 Mass. at 124-125. A conviction of either of

⁴ Title 8 U.S.C. § 1227(a), provides, in pertinent part, "Classes of deportable aliens. Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens: . . . Any alien who at the time of entry or adjustment of status was within one or more of the classes of aliens inadmissible by the law existing at such time is deportable."

the crimes of moral turpitude for which the defendant was charged⁵ would render the defendant, at a minimum, permanently inadmissible, which meant the defendant would not be allowed to either lawfully remain in or ever re-enter in the United States. See 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(1)(A). Furthermore, the same conviction would effectively bar the defendant's eligibility for cancellation of removal (including deportation) from the United States. See 8 U.S.C. § 1229b(b)(1)(C).⁶

An immigration-safe plea would have reduced if not eliminated the risk a conviction posed to the defendant and provided him the opportunity to remain with his family. See Padilla, 559 U.S. at 368, quoting Immigration & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 323 (2001), superseded by statute on other grounds ("[p]reserving the client's right to

⁵ It is undisputed that at the time of the defendant's conviction, the defendant's charges of malicious destruction of property (over \$250) and breaking and entering in the nighttime with intent to commit a felony were crimes of moral turpitude. See Matter of R, 5 I. & N. Dec. 612, 617 (B.I.A. 1954); Matter of M, 2 I. & N. Dec. 721, 723 (B.I.A. 1946).

⁶ Title 8 U.S.C. § 1229b(b) provides, in pertinent part, "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 [(C)] has not been convicted of an offense under section 1182(a)(2) [or] 1227(a)(2) [including crime of moral turpitude] . . ." (emphasis added).

remain in the United States may be more important to the client than any potential jail sentence"). Trial counsel deprived the defendant of this option, however, by failing to advise the defendant that the Commonwealth appeared open to plea negotiations and thus depriving the defendant of "the opportunity to make an intelligent decision, based on greater information, about whether to proceed to trial or to request that counsel engage in plea negotiations." Marinho, 464 Mass. at 127.⁷ Accordingly, trial counsel's performance "fell measurably below" the objective standard of reasonableness as required by Saferian. Marinho, supra.

Although it is undisputed that Padilla requires counsel to advise their clients of the client's known deportation risks, 559 U.S. at 374 ("we now hold that counsel must inform her client whether his plea carries a risk of deportation"), a defense attorney's obligation to advise criminal defendants on inadmissibility has not been directly answered by Massachusetts

⁷ The ordinary fallible attorney here was obligated to be aware that a conviction of the lesser included offenses of the crimes of moral turpitude or the assault and battery for which the defendant was charged would not subject him to the same adverse immigration consequences. See, e.g., Marinho, 464 Mass. at 127, citing Committee for Public Counsel Services, Assigned Counsel Manual c. 4, at 46 (rev. June 2011) (CPCS Manual) ("It is standard practice that 'the attorney should explore all alternatives to trial, including the possible resolution of the case through a negotiated plea or admission to sufficient facts'").

courts. See Commonwealth v. Lopez, 96 Mass. App. Ct. 34, 41 n.8 (2019).⁸ Considering the clear and dire risks that a criminal conviction of a crime of moral turpitude presented to the defendant's ability to lawfully remain or ever re-enter the United States, I conclude that Padilla and its progeny, Massachusetts statutory authority, the professional standards of legal representation of the time, and art. 12 of the Massachusetts Declaration of Rights required trial counsel to advise the defendant of the known adverse consequences a conviction would have to his admissibility, including the foreclosure of discretionary relief.

First, inadmissibility and deportation are inextricably connected to the defendant's ability to remain in the United States. In fact, Congress has long recognized that inadmissibility is inherently tied to deportability. See Vartelas v. Holder, 566 U.S. 257, 262 (2012) ("In [the Illegal Immigration Reform and Immigration Responsibility Act of 1996], Congress abolished the distinction between exclusion and deportation procedures and created a uniform proceeding known as

⁸ It is necessary to address the inadmissibility issue as it applied to the defendant, because, as discussed below, the defendant presented sufficient evidence on both prongs of the Saferian test based on trial counsel's failure to provide correct advice on the inadmissibility consequences triggered by his conviction to warrant an evidentiary hearing.

'removal').⁹ Further, the Padilla Court's concern of the immigration consequences of a criminal conviction was not strictly limited to the defendant's deportation risk, but instead with the "removal consequences" that stem from a qualifying conviction. Padilla, 559 U.S. at 373. As to the removal consequences of the defendant's convictions, the defendant's permanent inadmissibility is functionally equivalent to deportation because his ability to ever obtain either naturalization or other lawful status to remain in the United States was greatly diminished, if not permanently foreclosed.¹⁰ See 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1429. Furthermore, his inadmissibility status meant that he would be subject to

⁹ In 1996, the word "excludable" was replaced with "inadmissible" in the Immigration and Nationality Act. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, § 308. "Despite the change in terminology, the terms 'exclusion' and 'inadmissibility' are functionally equivalent." 5 C. Gordon, S. Mailman, S. Yale-Loehr, & R. Wada, Immigration Law and Procedure, § 63.01[2] (rev. ed. 2025). See Vartelas, 566 U.S. at 262.

¹⁰ A person may seek a discretionary waiver of inadmissibility due to a crime of moral turpitude under 8 U.S.C. § 1182(h). However, such a waiver is available only if the person establishes that their inadmissibility status would cause "extreme hardship" to a member of their intermediate family, who must also be either a lawful permanent resident or United States citizen, or if fifteen years have passed since the date of the defendant's conviction. Id.

mandatory deportation if he ever attempted to re-enter the United States. See 8 U.S.C. § 1227(a)(1)(A).

The defendant's conviction of a crime of moral turpitude also serves as a bar to discretionary relief from removal proceedings. See 8 U.S.C. § 1229b(b)(1)(C). This significant risk to the defendant's ability to receive discretionary relief from inadmissibility status, which would otherwise mandate removal, falls squarely under the adverse immigration consequences that a defense counsel must adequately advise of under Padilla. See Padilla, 559 U.S. at 368, quoting St. Cyr, 533 U.S. at 323 ("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'"); Lavrinenko, 473 Mass. at 62 ("the clear immigration consequence of the defendant's plea . . . was the substantial risk that he would lose a viable opportunity for discretionary relief"); DeJesus, 468 Mass. at 182.

In addition, a conviction of a crime of moral turpitude would very likely increase the defendant's chance of being deported, given the long-standing Federal public policy of prioritizing the deportation of those with criminal

convictions.¹¹ Being inadmissible essentially placed the defendant in permanent unlawful-status limbo, rendering him more vulnerable to an order of deportation and limited avenues of discretionary relief. See Padilla, 559 U.S. at 363-364 ("Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments [to the Immigration and Nationality Act], his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel

¹¹ Deporting "criminal aliens" was a priority of President Clinton Administration in the 1990s. See President William J. Clinton, 1995 State of the Union Address (Jan. 24, 1995) ("That's why our administration has moved aggressively to secure our borders more by . . . deporting twice as many criminal aliens as ever before . . ."); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546, §§ 308, 321, 671 (expanding definition of aggravated felony and requiring expedited removal procedures for those convicted of aggravated felony). See also The New York Times, Campaigns: White House 2000, Immigration Policy Positions, N.Y. TIMES (Oct. 9, 2000), <https://archive.nytimes.com/www.nytimes.com/library/politics/campaign/whouse/policy-immigration.html> [<https://perma.cc/GDY4-RWWW>] ("In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act and the Anti-terrorism and Effective Death Penalty Act. The law -- the first major overhaul of America's immigration laws in [thirty] years -- calls for the deportation of any noncitizen convicted of a felony, regardless of when the crime was committed or any other mitigating circumstances"). Recent legislation has continued this trend. See Laken Riley Act, Pub. L. No. 119-1, 119th Cong. § 1 (2025) (expanding categories of crimes that require mandatory detention by United States Department of Homeland Security).

removal for noncitizens convicted of particular classes of offenses").

The above issues are the types of grave immigration consequences that are "like deportation," of which counsel must advise criminal defendants. Padilla, 559 U.S. at 371. It would be inconsistent with Padilla and its progeny to conclude that counsel has an obligation to advise a defendant only that they may be subject to deportation, which is part of the removal process, while declaring that counsel has no obligation to advise the defendant that the same criminal conviction would also (1) render the defendant permanently inadmissible and presumptively lead to his removal, (2) completely bar potential defenses or discretionary relief to the very same removal or deportation action, and (3) deny the defendant the chance to ever lawfully reenter the United States. See id. at 370 ("When attorneys know that their clients face possible exile from this country and separation from their families, they should not be encouraged to say nothing at all"). Instead, Massachusetts law holds that counsel must advise their clients about immigration consequences associated with a criminal conviction, "however imposed."¹² Marinho, 464 Mass. at 125. Cf. Lopez, 96 Mass. App.

¹² The Marinho court cited as persuasive authority the Committee for Public Counsel Services (CPCS), Assigned Counsel Manual. See Marinho, 464 Mass. at 125-126, citing CPCS Manual c. 4, at 15 (rev. June 2011) ("Counsel must also advise the

Ct. at 39 n.8 (2019) ("as the Commonwealth acknowledges, in some circumstances . . . it may constitute ineffective assistance not to warn about the specific inadmissibility consequences of a guilty plea"). Here, the impact of the clear, mandatory, and dire immigration consequences of a conviction of a crime of moral turpitude as related to the defendant's inadmissibility status was tantamount to making him presumptively deportable. Thus, trial counsel was obligated to advise the defendant on the inadmissibility consequences as set forth above.

Furthermore, contrary to the court's assertion that this dissent represents a post hoc view as to trial counsel's obligations, ante at , the Massachusetts Legislature mandated, well before Padilla, that criminal defendants should be informed of the adverse immigration consequences attendant to a criminal conviction beyond the threat of deportation. At the time the defendant's case was resolved, G. L. c. 278, § 29D, required judges conducting plea colloquies to advise criminal defendants that "conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of

client . . . of the consequences of a conviction, including . . . possible immigration consequences including but not limited to deportation, denial of naturalization or refusal of reentry into the United States").

naturalization, pursuant to the laws of the United States" (emphasis added). G. L. c. 278, § 29D, as amended by St. 1996, c. 450, § 254 (effective December 27, 1996).¹³ Because this required warning is intended to supplement counsel's advice to a defendant, rather than replace it, G. L. c. 278, § 29D, is properly viewed as setting a minimum standard of advice. See Clarke, 460 Mass. at 48 n.20 ("[T]he receipt of such [G. L. c. 278, § 29D,] warnings is not an adequate substitute for defense counsel's professional obligation to advise [his or] her client of the likelihood of specific and dire immigration consequences that might arise from such a plea"). See also Padilla, 559 U.S. at 374 n.15 ("[W]e find it significant [in assessing counsel's obligation to warn of risk of deportation] that the plea form currently used in Kentucky courts provides notice of possible immigration consequences. . . . Further, many States require trial courts to advise defendants of possible immigration consequences" [citing to numerous State statutes including G. L. c. 278, § 29D]). As deportation, exclusion from admission to the United States, and denial of

¹³ The majority argues that even considering such advice as necessary would be "farfetched" at the time of the defendant's conviction. Ante at . However, the relevant language in G. L. c. 278, § 29D, pertaining to inadmissibility has existed since 1978, more than twenty years before the defendant's conviction. See G. L. c. 278, § 29D, inserted by St. 1978, c. 383.

naturalization are listed together in G. L. c. 278, § 29D, as immigration consequences, it would be inconsistent with the requirement of advising a client on immigration consequences to conclude that counsel would solely have an obligation to advise their clients as to deportation. See Marinho, 464 Mass. at 125.

In addition to the minimum standard of advice set forth in plea colloquies, professional standards in Massachusetts at the time also required attorneys to advise their clients on adverse immigration consequences extending beyond deportation. See Clarke, 460 Mass. at 42, quoting Padilla, 559 U.S. at 357 (constitutionally deficient representation is "necessarily linked to the practice and expectations of the legal community"). "[S]ince 1988, [the Committee for Public Counsel Services (CPCS)] has required all staff attorneys and bar advocates in Massachusetts to advise a defendant client of the immigration consequences of his or her criminal case" (emphasis added). Clarke, supra at 43 n.15. Trial counsel's proffered standard, immigration-consequence advice shows his acknowledgment that he was obligated to warn the defendant of inadmissibility risks stemming from a conviction. Furthermore, the record shows that trial counsel acknowledged to motion counsel that at the time of the defendant's convictions, trial counsel's point of contact or supervisor from the bar advocate program "was insistent that [criminal defense attorneys]

provided the immigration warning [G. L. c. 278, § 29D,] to assigned clients."

Although the Supreme Judicial Court has not yet directly addressed whether inadmissibility consequences are required under Padilla, I note that the highest State courts in both Arizona and Iowa have concluded that Padilla requires counsel to advise similarly situated defendants on certain inadmissibility consequences. See State v. Nunez-Diaz, 444 P.3d 250, 255 (Ariz. 2019) (concluding counsel provided ineffective assistance of counsel under Padilla by failing to advise noncitizen client of consequences from guilty plea of being permanently barred from reentry into United States and losing eligibility for cancellation of removal); Diaz v. State, 896 N.W.2d 723, 729-732 (Iowa 2017) (counsel obligated under Padilla to inform clients of adverse inadmissibility consequences including foreclosure of cancellation of removal proceeding and permanent bar on legal reentry). But see Rosario v. State, 165 So. 3d 672, 673 (Fla. Dist. Ct. App. 2015) ("Beyond advising of the risk of deportation as required by Padilla, counsel had no affirmative duty to provide advice about other possible immigration ramifications of the plea, such as whether the plea might negatively impact [appellant's] ability to obtain an adjustment in status, a waiver of inadmissibility, or cancellation of removal"); Garcia v. State, 425 S.W.3d 248, 260 (Tenn. 2013)

("Padilla neither mandates, nor even suggests, that defense counsel in a state criminal trial must be able to advise her client of the effect a guilty plea is likely to have upon the client's future eligibility to immigrate legally to the United States").

Even assuming *arguendo* that Padilla holds that the Sixth Amendment does not require counsel to advise noncitizen clients of inadmissibility risks, this court should not strive to hew to the minimum United States constitutional protection required. The Supreme Judicial Court has long recognized that art. 12 guarantees a defendant's right to counsel independent from the Sixth Amendment. See Commonwealth v. Dew, 492 Mass. 254, 261 n.17 (2023), quoting Commonwealth v. Hodge, 386 Mass. 165, 169 (1982) ("We have often noted that art. 12 provides 'greater safeguards' than those provided by the Sixth Amendment"). Consistent with our precedent, this court should conclude that a defendant's right to advice as to the immigration consequences of their conviction must include the defendant's potential inadmissibility status considering, as set forth above, both trial counsel's obligations and the enormity of the consequence to the defendant. See Lavrinenko, 473 Mass. at 63 n.25 ("We need not determine whether [a counsel's obligation to advise a defendant on the substantial risk of losing a viable opportunity for discretionary relief] is dictated by Federal constitutional

law; it is sufficient that it is dictated by art. 12 of the Massachusetts Declaration of Rights"). See also Sylvain, 466 Mass. at 436 ("art. 12 demands that defense counsel provide defendants with accurate advice concerning the deportation consequences of a guilty plea or conviction at trial").

Here, the defendant's trial counsel informed motion counsel, through an e-mail message, that his "policy at the time was to tell clients that if they were charged with a drug crime, a crime of violence, or a crime involving moral turpitude, they would more likely than not be deported, denied readmission to the country, or denial of citizenship. [He] advised this client [the defendant] of that fact in this case." This advice was insufficient. As the crimes the defendant was charged with would both clearly and directly result in the defendant being rendered inadmissible if convicted, and thus cut off avenues of permanent residency and most forms of discretionary relief from removal, the defendant's trial counsel's performance fell measurably below that which might be expected from an ordinary fallible lawyer.¹⁴ See Padilla, 559 U.S. at 369; Lavrinenko, 473 Mass. at 62. The issue here is not whether trial counsel was

¹⁴ The Commonwealth agrees that, assuming arguendo that advice regarding the "inadmissibility risks" of a conviction was required, trial counsel's "general advice" that the defendant would "more likely than not" be inadmissible was insufficient under Padilla.

aware of his obligations to advise his clients of immigration consequences, as the standards of the time and his very admissions show that he was aware. Rather, trial counsel's deficient performance stemmed from his rote, one-size-fits-all immigration warning, and his failure to review the relevant deportation and removal statutes in order to provide complete and accurate advice to the defendant. See Padilla, 559 U.S. at 369.

Hence, as trial counsel's advice as to the immigration consequences of the defendant's conviction was deficient, the defendant satisfied the first prong of Saferian.

2. Prejudice. The court concludes that even if trial counsel's advice to the defendant was deficient, the defendant failed to demonstrate that he suffered prejudice from counsel's performance. Ante at . I depart from the court's decision by concluding that the defendant raised a substantial issue warranting an evidentiary hearing as to whether he suffered prejudice due to trial counsel's ineffective performance.

When a defendant who was convicted at trial seeks to establish prejudice because of their counsel's insufficient performance, they "must show a reasonable probability that the result of a plea would have been more favorable than the outcome of the trial." Marinho, 464 Mass. at 129. Specifically, "the

defendant must demonstrate a reasonable probability that the prosecution would have made an offer, that the defendant would have accepted it, and that the court would have approved it."

Id.

Here, in assessing the adequacy of the defendant's showing on prejudice, it is first important to acknowledge that the defendant's trial counsel refused to cooperate with the defendant's motion for a new trial, thereby hampering the defendant's ability to make a showing of prejudice on the papers.¹⁵ Trial counsel's refusal to cooperate was detrimental to the defendant because trial counsel's e-mail messages indicate that had he provided an affidavit, it may have been beneficial to the defendant. In particular, an affidavit from trial counsel may have established factors including: whether counsel was aware the defendant was not a citizen; whether counsel had plea discussions with the Commonwealth that he did not convey to the defendant; whether counsel provided his standard immigration warning to the defendant; and whether counsel's approach in this case was influenced by his mistaken belief that a sentence of "unsupervised probation of [six]

¹⁵ Motion counsel stated that he was prepared to compel trial counsel to testify pursuant to a subpoena if the judge had granted an evidentiary hearing.

months or less would prevent the [defendant] from having immigration issues."¹⁶

In addition, the absence of an affidavit from trial counsel resulted in an unjustified adverse inference against the defendant. See Commonwealth v. Martinez, 86 Mass. App. Ct. 545, 550-552 (2014) ("Because the motion judge appears to have based her decision in large part on the defendant's failure to produce an affidavit from plea counsel, without appearing to consider the circumstances of that failure, this case must be remanded for an evidentiary hearing"). Thus, it was error for the motion judge in this case to base his decision in part on the defendant's failure to produce an affidavit from his trial counsel.¹⁷

¹⁶ Trial counsel had informed motion counsel that "[a]t that time [that he represented the defendant], there was a popular theory among immigration lawyers that an unsupervised probation of [six] months or less would prevent the client from having immigration issues."

¹⁷ The motion judge denied the defendant's motion for a new trial with a margin order that cited the "reasons advanced by the Commonwealth." Regarding the defendant's claim of ineffective assistance of counsel, the Commonwealth opposed on four grounds. First, the Commonwealth noted the lack of an affidavit from trial counsel and that the defendant's affidavit was "self-serving." Second, the Commonwealth argued that there was no indication that the defendant was deprived of a fair trial. The defendant, however, did not argue he was deprived of a fair trial; rather he argued that he would have sought an immigration-safe plea. Third, the Commonwealth argued that the defendant failed to produce evidence that the defendant and his trial counsel did not engage in plea negotiations. Fourth, the Commonwealth argued that counsel was not ineffective for not

Turning to the defendant's claim, I conclude that the defendant raised a substantial issue as to prejudice: specifically, whether there is reasonable probability that the defendant and the Commonwealth would have fashioned an immigration-safe plea agreement that would have been accepted by the judge. Several factors instruct that the defendant would have sought and obtained an immigration-safe plea. First, the defendant averred that trial counsel never told him about a conviction having adverse immigration consequences, and that he would have pursued an immigration-safe plea agreement had he known of these risks. While trial counsel, in an e-mail message to motion counsel, stated that the defendant did not express interest in pursuing a plea, the record squarely raises the issue that the defendant was unaware of the immigration consequences of a conviction. As such, the defendant was deprived of the opportunity to make an intelligent decision whether to go to trial. See Marinho, 464 Mass. at 127.

Had he been properly advised of the immigration consequences, the defendant has averred substantial reasons to be motivated to seek a favorable plea, given that his wife and their child lived in Massachusetts at the time of trial and that

"hav[ing] the charges amended" because that decision rested with the Commonwealth.

he may face violence should he be returned to his home country. See DeJesus, 468 Mass. at 184 (special immigration circumstances included that 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"); Martinez, 86 Mass. App. Ct. at 552-553 (remand for consideration of prejudice where defendant was "a United States resident since early childhood, employed with a family, including a common-law wife and three children who were all United States citizens"). Because it is unclear whether the judge credited the defendant's claims, this issue should be explored in an evidentiary hearing.

Second, for the defendant to obtain an immigration-safe plea, the Commonwealth would have had to agree to not proceed on the crimes involving moral turpitude. In assessing whether to attempt to resolve criminal cases short of trial, prosecutors are encouraged to view the potential immigration consequences as part of a plea.¹⁸ Here, we know from trial counsel's e-mail

¹⁸ As Justice Duffly noted, concurring in part and dissenting in part in Marinho,

"The President of the National District Attorneys Association has urged prosecutors to consider the immigration consequences of a defendant's conviction 'if we are to see that justice is done.' Prosecutors have a duty to do justice, not to win cases. Commonwealth v. Shelley, 374 Mass. 466, 472 (1978), quoting Berger v. United States, 295 U.S. 78, 88 (1935) ('the prosecuting attorney "is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially

messages that the Commonwealth engaged in plea negotiations, although the details of these discussion are unknown.¹⁹ The Commonwealth, in addition to the customary considerations for entering into a plea agreement, may have considered the immigration consequences of a conviction of the type of offense that the defendant was charged with as a reason to agree to an immigration-safe plea in this case.²⁰ In an evidentiary hearing,

is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done"')" (Citation omitted.)

464 Mass. at 139 n.7.

¹⁹ If remanded for a hearing, the defendant would have the burden of establishing the nature of the plea discussions. The prosecutors could be requested to offer their respective memories and perspectives to not only the plea negotiations but to the district attorney's office's policies and practices for resolving cases for first-time offenders. One former prosecutor, as identified in one of trial counsel's e-mail messages to motion counsel, is presently a District Court judge. It is unclear whether motion counsel efforted to contact an assistant district attorney or other attorney who was involved in this case or had knowledge of the practices of the district attorney's office and the District Court at the time of the defendant's conviction. While this information would have been helpful in casting light on pertinent issues, the absence of such is not fatal to the defendant's motion due to the attendant circumstances.

²⁰ As the Padilla Court noted,

"informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal

the defendant may elect to seek to introduce evidence concerning the Commonwealth's position in this case as well as its general plea practice at the time.

Perhaps the most significant factor supporting the reasonable probability that the defendant would have been able to secure an immigration-safe plea is the legal environment in which he was charged. This court should acknowledge, from its collective experience and familiarity with the trial court, that it is not uncommon for assistant district attorneys to agree to plea recommendations that include charge concessions. Acknowledging this practice is part of the broader recognition that the great majority of criminal cases are resolved through plea negotiations. See, e.g., Marinho, 464 Mass. at 127 ("[p]leas account for nearly [ninety-five percent] of all

episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel 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. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does."

Padilla, 559 U.S. at 373.

criminal convictions" [citation and quotation omitted]).²¹

Furthermore, in Massachusetts, the criminal justice system is designed, or at least has evolved, to treat first-time offenders similar to the defendant with leniency by emphasizing factors such as a defendant's personal circumstances and preservation of a defendant's record over more punitive consequences. In fact, our Legislature long ago enacted a disposition common to the District Court that allows for a defendant to avoid a guilty conviction by admitting to sufficient facts. See G. L. c. 278, § 18, as amended by St. 1992, c. 379, § 193 (effective January 13, 1993).²² The Supreme Judicial Court, in Commonwealth v. Duquette, recognized the significant and mutual benefits of such a disposition to the parties in a criminal case, by stating,

"We recognize that the 'continuance without a finding' is a procedure which often serves the best interests of both the Commonwealth and the defendant. The benefit to a defendant

²¹ See Missouri v. Frye, 566 U.S. 134, 143-144 (2012), quoting Lafler v. Cooper, 566 U.S. 156, 170 (2012) ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours 'is for the most part a system of pleas, not a system of trials,' it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process").

²² See Commonwealth v. Pyles, 423 Mass. 717, 722 (1996) (providing nonexhaustive list of statutes that "either permit or mandate analogous [to G. L. c. 278, § 18,] forms of disposition by means of pretrial diversion").

is obvious: he may be able to avoid a trial and 'earn' a dismissal of the indictment or complaint, thereby avoiding the consequences of having a criminal conviction on his record. These advantages would be especially appealing to a first offender or a defendant whose job security or family situation might be threatened by a conviction. The Commonwealth avoids the more time-consuming process of trial and sentencing. Statutes or court rules specifically authorizing practices similar to the continuance without a finding have been adopted in many jurisdictions. See Annot., 4 A.L.R. 4th 147 (1981). It has been suggested that such 'pre-trial diversion' programs reduce the risk of recidivism for first time offenders, enable a defendant to preserve his community and family ties, and help reduce court backlogs. See A. W. Campbell, Law of Sentencing § 104 (1978); J. S. Williams, The Law of Sentencing and Corrections, at 88-90 (1974)" (Emphasis added.)

Commonwealth v. Duquette, 386 Mass. 834, 843 (1982), superseded by G. L. c. 278, § 18, as amended by St. 1992, c. 379, § 193.

See Commonwealth v. Rotonda, 434 Mass. 211, 216 (2001)

("Continuances without a finding and admissions to sufficient facts have long been part of the District Court practice"). In assessing the adequacy of the defendant's showing that an immigration-safe plea was reasonably probable had trial counsel performed effectively, we should not ignore the reality that pleas that involve leniency for first-time offenders are a part of the fabric of the District Court.²³

²³ Courts are permitted to take judicial notice of well-known circumstances present in the Commonwealth's judiciary and the Commonwealth itself. See, e.g., Moore v. Executive Office of the Trial Court, 487 Mass. 839, 849 & n.13 (2021) (judicial notice taken of breadth of trial court); Commonwealth v. Pon, 469 Mass. 296, 315-316 (2014) ("Given the evidence of the long-term collateral consequences of criminal records, judges may take judicial notice that the existence of a criminal record,

Here, both the number and nature of the charges allowed for flexibility for the parties to arrive at an immigration-safe plea that would benefit both parties.²⁴ For instance, both charges against the defendant of crimes of moral turpitude included lesser included offenses to which the defendant could have entered into an immigration-safe plea.²⁵ Thus, the parties

regardless of what it contains, can present barriers to housing and employment opportunities"); Commonwealth v. De La Cruz, 405 Mass. 269, 277 (1989) (Liacos, J., concurring), abrogated on other grounds by Commonwealth v. Colon, 482 Mass. 162 (2019) ("I would take judicial notice of the unfortunate prevalence of prejudice against Hispanics in our Commonwealth"); Bougas v. Chief of Police of Lexington, 371 Mass. 59, 65 (1976) ("given the congested state of affairs in the Superior Court of the Commonwealth, a situation of which we take judicial notice"); Commonwealth v. Jones, 9 Mass. App. Ct. 103, 121 (1980), S.C., 382 Mass. 387 (1981) (Brown, J., concurring) ("racial prejudice ought to be judicially noticed [in certain circumstances]").

²⁴ The portion of the police report from the incident leading to the charges against the defendant reflects that two victims accused the defendant and another man of breaking a car window before running away with a group of men. At least the codefendant then "hit" and "struck" the victims. The truncated report does not detail that the defendant hit anyone. He was acquitted of the assault and battery charge at trial.

²⁵ The defendant faced adverse immigration consequences for a conviction of malicious destruction of property over \$250, allowing a sentence of imprisonment for more than one year, G. L. c. 266, § 127, as amended through St. 1994, c. 168, § 4 (effective January 25, 1995), but not for the lesser included offense of malicious destruction of property under \$250, for which punishment of imprisonment cannot be for more than two and one-half months, *id.* See 8 U.S.C. § 1227(a)(2)(A)(i)(II). Similarly, the defendant faced adverse immigration consequences for the charge of breaking and entering in the nighttime with intent to commit a felony (larceny), G. L. c. 266, § 16, allowing a sentence of imprisonment for more than one year, but

could have agreed to a combination of charged offenses to arrive at a plea proposal that would not have jeopardized the defendant's ability to remain in the United States. See Clarke, 460 Mass. at 48 n.18 ("Prejudice may be shown in some cases by establishing that had the defendant and counsel properly understood and considered the deportation consequences of guilty pleas to some charges, counsel likely would have been able to negotiate a plea to other charges that would not have carried such a consequence"). Such a result depended on competent counsel. See Missouri v. Frye, 566 U.S. 134, 144 (2012) ("In order that these benefits [to both parties entering into a plea agreement] can be realized, however, criminal defendants require effective counsel during plea negotiations").

Third, the defendant made a sufficient showing to require a hearing as to whether there was a reasonable probability a judge would have approved an immigration-safe plea. A judge presiding over a plea would have considered dispositional goals and the nature of the criminal offenses when fashioning a sentence for a

not for the lesser included offense of breaking and entering with the intent to commit a misdemeanor, for which punishment of imprisonment cannot be for more than six months, G. L. c. 266, § 16A. See 8 U.S.C. § 1227(a)(2)(A)(i)(II). The Commonwealth agrees that the defendant would not have been rendered inadmissible had he pleaded guilty to the lesser included offenses and the assault and battery offense.

first-time offender like the defendant.²⁶ Here, it is notable that the trial judge sentenced the defendant to unsupervised probation for a term of six months as contrasted with a lengthier period of supervised probation or even incarceration. Cf. Gordon, 82 Mass. App. Ct. at 401 ("we conclude that a plea bargain for a sentence of less than one year on the [assault and battery on a police officer], with different deportation consequences as a matter of law, may have been a reasonable probability given the over-all sentence [the defendant] received, and so it may have been rational for him to reject the one-year sentence on the [assault and battery on a police officer]").

Thus, I conclude that when considering whether the defendant met his burden to establish a substantial issue of prejudice, neither the nature nor likelihood of an immigration-safe resolution in this case represent the fruits of a

²⁶ See Commonwealth v. Plasse, 481 Mass. 199, 205 (2019) ("We have long held that '[a] judge has considerable latitude within the framework of the applicable statute to determine the appropriate individualized sentence.' That sentence should reflect the judge's careful assessment of several goals: punishment, deterrence, protection of the public, and rehabilitation. . . . In fashioning an appropriate and individualized sentence that takes account of a defendant's personal history, a judge has discretion to weigh many factors which would not be relevant at trial, including the defendant's behavior, background, family life, character, history, and employment" [citations and quotations omitted]).

"sophisticated" plea, ante at , of which there was no reasonable probability of obtaining, but rather present the basis for a routine disposition entered in our busy criminal courts on a regular if not daily basis.

Finally, I disagree with the court that this case is nearly identical to Marinho. Ante at . See 464 Mass. at 115-133. The court in Marinho addressed fundamentally different circumstances that supported its conclusion that the defendant in Marinho was not prejudiced by counsel's ineffective performance. See id. at 133. First, in Marinho, trial counsel cooperated and provided an affidavit for the defendant's motion for a new trial. See id. at 128-129. The prosecutor and counsel for the codefendant in Marinho also submitted affidavits, and there was agreement between counsel that trial counsel for Marinho refused to engage in plea negotiations. See id. at 123 n.10, 128-129. Thus, it was undisputed that defense counsel refused to engage in plea negotiations with the prosecutor and failed to discuss that option with the defendant. Id. at 127-130.

In contrast, trial counsel in this case admitted in postmotion correspondence with motion counsel by e-mail messages, filed with the defendant's motion for reconsideration,

that "plea recommendations were discussed."²⁷ Having demonstrated that plea discussions occurred, the defendant is entitled to an evidentiary hearing to examine whether the substance of these plea negotiations were favorable to the defendant's immigration status or whether trial counsel ever informed the defendant of these plea discussions. See Gordon, 82 Mass. App. Ct. at 401; Martinez, 81 Mass. App. Ct. at 600.

Furthermore, trial counsel's affidavits in Marinho did "not establish that 'better work might have accomplished something material for the defense.'" 464 Mass. at 129, quoting Commonwealth v. Dargon, 457 Mass. 387, 403 (2010). That is because the court in Marinho found that even if the defendant had successfully pleaded guilty to a lesser charge as proffered by motion counsel, the defendant may have faced the same adverse immigration consequences triggered by the original charge. See Marinho, supra at 131-132 ("even if the prosecutor had offered a plea to simple assault . . . the defendant well may have faced the same immigration consequence"). In addition, there was no evidence that Marinho's conviction factored into his removal. Id. at 130-131.

²⁷ Trial counsel not only refused to submit an affidavit but also refused to provide his case notes to motion counsel. We have no way of knowing whether the notes contain references to the plea discussion or other relevant issues.

By contrast, at the time of his appeal, the defendant in this case was still in the United States and was not facing a removal action. Instead, the defendant sought a "green card," and his immigration counsel advised him that the conviction at issue in this appeal foreclosed such relief. Thus, the prejudice that stems from the defendant's conviction is not predicated on an event that had already occurred with no evident causal connection, such as the deportation in Marinho. Instead, the defendant averred that he is adversely impacted by his inadmissibility status, due to his conviction, which has foreclosed his ability to seek permanent resident status and affirmative relief in any potential future removal action.

Of course, the defendant's burden on a motion for a new trial is not to establish actual prejudice to his immigration status; rather it is to establish "a reasonable probability that the result of a plea would have been more favorable than the outcome of the trial." Marinho, 464 Mass. at 129. The defendant here made a substantial showing of the potential for an immigration-safe plea to require an evidentiary hearing, and thus, a remand is necessary. See Gordon, 82 Mass. App. Ct. at 401-402; Martinez, 81 Mass. App. Ct. at 596, 600.

Conclusion. "It is difficult to overstate the essential importance of the right to counsel in our adversary system of criminal justice. See United States v. Cronin, 466 U.S. 648,

653 (1984) (accused person's right to counsel 'is a fundamental component of our criminal justice system')." Dew, 492 Mass. at 261. "The procedural and substantive safeguards that define our criminal justice system and are designed to assure that the accused receives fair proceedings and a fair trial largely would be for naught if the accused were left to fend for him- or herself without the assistance of counsel to navigate and exercise his or her rights." Id., citing Gideon v. Wainwright, 372 U.S. 335, 344-345 (1963). Here, trial counsel failed to meet the prescribed safeguards, and as a result of this failure, the defendant navigated his criminal charges under a mistaken premise and was thus deprived of an accessible and fair criminal proceeding. Because the defendant has demonstrated, first, that his trial counsel's performance was constitutionally deficient; and, second, that substantial issues exist concerning whether there is a reasonable probability that he would have received a more favorable disposition but for trial counsel's deficient performance, this matter should be remanded for an evidentiary hearing as to this additional issue. Such an evidentiary hearing is required to ensure that this court abides by its "responsibility under the Constitution to ensure that no criminal defendant -- whether a citizen or not -- is left to the 'mercies of incompetent counsel.'" Padilla, 559 U.S. at 374, quoting McMann v. Richardson, 397 U.S. 759, 771 (1970).

Respectfully, I dissent.