



# The Commonwealth of Massachusetts

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## A Practice Advisory on *Commonwealth v. DeJesus* May 2014

### I. Introduction

In 2010, the U.S. Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010), articulated what had long been the best practice among defense counsel in Massachusetts – that as part of effective representation, defense counsel must advise noncitizen clients regarding the immigration consequences of criminal dispositions. Where the immigration consequences are unclear, defense counsel need only provide a general warning that a disposition “may carry a risk of adverse immigration consequences.” *Id.* at 369. Where the consequences are clear, however, “the duty to give correct advice is equally clear.” *Id.* What is the “correct advice” that must be given was left unaddressed by the Court. This question was directly presented to the Supreme Judicial Court in *Commonwealth v. DeJesus*, 2014 Mass. LEXIS 389, SJC-11392 (May 19, 2014).

### II. The *DeJesus* Decision

In 2010, Mr. DeJesus, a long-time lawful permanent resident (LPR – often known as a “green card” holder), pled guilty to possession with intent to distribute cocaine and received a sentence of probation. This disposition represented a reduced charge from trafficking in cocaine, twenty-eight grams or more, and therefore allowed Mr. DeJesus to avoid a five year mandatory minimum sentence. Prior to pleading guilty, Mr. DeJesus consulted with his defense attorney, who told him that any plea would make him “eligible for deportation” and that he “face[d] being deported and being denied reentry into the United States.” Plea counsel did not tell the defendant that both trafficking and possession with intent to distribute cocaine are considered “aggravated felonies,” pursuant to 8 U.S.C. § 1101(a)(43)(B), that result in virtually automatic deportation and bar re-entry into the U.S. for life. Plea counsel provided the defendant with the name and contact information for an immigration attorney but never confirmed that the defendant had received any advice from this attorney. After being told that he would be “eligible for deportation,” the defendant decided to forego proceeding with a meritorious motion to suppress and accept the Commonwealth’s plea offer. It was his first arrest and first conviction.

In 2011, while on probation, Mr. DeJesus was arrested for driving on a suspended license and was transferred to immigration custody. Finding that Mr. DeJesus had been convicted of an aggravated felony, the immigration judge found that he was subject to removal, ineligible for any defense to deportation, and ordered him removed. Mr. DeJesus subsequently filed a motion to withdraw his guilty plea which was allowed by the trial judge, who concluded that defense counsel's advice was incomplete and therefore constitutionally deficient and that Mr. DeJesus had shown prejudice. The Commonwealth appealed and the SJC transferred the case on its own motion.

**a. Deficient Performance: Adequacy of Advice**

The Court began its analysis by rejecting the Commonwealth's argument that the *Padilla* decision resolved the question of what immigration advice is required, observing that the Supreme Court "did not formulate the precise language that would satisfy [the Sixth Amendment] obligation, and understood that the content of the advice would depend on the circumstances."

Next, the Court noted that the immigration consequences faced by Mr. DeJesus were clear:

Pursuant to Federal statute, an alien "shall, upon the order of the United States Attorney General, be removed" if he or she is convicted of an aggravated felony, see 8 U.S.C. § 1227(a)(2)(A)(iii) (2006), and the defendant's conviction of "possession with intent to distribute a class B controlled substance, G. L. c. 94C, § 32A, . . . is an aggravated felony." [*Commonwealth v. Clarke*, 460 Mass. 30, 32 n.2 (2011)]. Under applicable Federal law, the defendant would have virtually no avenue for relief from deportation once convicted of that crime. See *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1682, 185 L. Ed. 2d 727 (2013) (Federal statute "prohibits the United States Attorney General from granting discretionary relief from removal to an aggravated felon, no matter how compelling his case").

As a consequence, the correct advice must necessarily convey both that the Mr. DeJesus was subject to removal and that he had no defense to deportation. The Court explained:

Counsel therefore was obligated to provide to his client, in language that the client could comprehend, the information that presumptively mandatory deportation would have been the legal consequence of pleading guilty. Stated differently, counsel needed to convey that, if Federal authorities apprehended the defendant, deportation would be practically inevitable.

The Court nevertheless declined to "dictate the precise language that must be employed, as each case will present different circumstances." Such advice must take into consideration both the client's ability to comprehend and the particular circumstances of the case; someone who is deportable may still have an available defense to deportation.

With these standards in mind, the Court turned to the advice defense counsel gave Mr. DeJesus and found it inadequate, "because it did not convey what is clearly stated in Federal law." "Eligible for deportation" suggests that discretion may be exercised to avoid deportation. Similarly, the SJC observed, "advice that one 'faces' deportation does not inform a client that deportation will be mandatory if one is

apprehended by Federal authorities. There is a significant difference, for example, in a lawyer's advice to a client that the client faces five years of incarceration on a charge, as compared to advice that the conviction will result in a five-year mandatory minimum prison sentence."

Based on these failures, the Court concluded that the trial attorney's performance in this case was deficient.

### **b. Prejudice**

Having established deficient performance, the defendant then must show that, but for counsel's deficient performance, he would have done something differently. The defendant must demonstrate "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 46-47. Although in this case the Commonwealth had conceded that the defendant had established prejudice, the Court took the opportunity to examine the issue. In *Clarke*, the SJC found that a defendant may show prejudice in any one of three ways:

1. The defendant had an available, substantial ground of defense;
2. There is a reasonable probability that a different plea bargain could have been negotiated;
3. "Special circumstances" existed that caused the defendant to place particular emphasis on immigration consequences, such that he would have risked going to trial even if there was a strong likelihood that he would be found guilty.

In this case, the SJC concluded that the trial judge did not abuse his discretion in finding prejudice under both the first and the third *Clarke* prongs. First, Mr. DeJesus had a viable motion to suppress which constituted a substantial ground of defense to the drug charges.

Second, Mr. DeJesus had established "special circumstances," in light of his long residence in Boston, his family in Boston (including a young child and a pregnant wife), and his history of steady employment. The Court rejected the Commonwealth's argument that Mr. DeJesus could not show prejudice because he "got a very good deal," given the reduced charge and the probationary sentence. The SJC explained: "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. For a noncitizen defendant, preserving his 'right to remain in the United States may be more important to him than any jail sentence' (quoting *Padilla*)."

### **III. The Dissent**

As the sole dissenting justice, Justice Cordy disagreed that trial counsel's advice had been inadequate. Cordy wrote: "If anything, under the circumstances, the attorney's attention to this matter exemplified an earnest and reasonable attempt at alerting a client intent on avoiding a jail sentence (on the five-year mandatory minimum trafficking charge) that there would likely be deportation consequences of which the defendant needed to be aware." Cordy added, "deportation has not been demonstrated to be inevitable in the aftermath of every plea of guilty that creates either 'eligibility' or even a 'presumption' of deportation." In a footnote, Justice Cordy asked:

If there are limited exceptions to the “practically inevitable” result of deportation, do such exceptions need to be explored by defense counsel with the defendant as well to ensure adequate and accurate advice? And will a claim for ineffective assistance of counsel lie if a defendant proceeds to trial (and is convicted and sentenced) based on advice that fails to include a complete and accurate explanation of all possible exemptions that might be available?

#### **IV. Conclusion**

The SJC’s decision provides guidance to defense counsel in several areas:

- Advice about immigration consequences must be specific and accurately convey what the law requires, not only statements about the probability of apprehension by immigration officials.
- Required advice includes an analysis of whether a disposition will make a defendant deportable or inadmissible and whether the defendant would have any available defense to removal from the U.S.
  - Note: As Justice Cordy observed in his footnote, it is unclear how far defense counsel must go when exploring available defenses to removal. It is clear from the majority’s decision, however, that the fact that a disposition would bar a noncitizen from a defense to deportation, thereby making removal virtually certain, is an essential part of the immigration consequences of a disposition and must be explained to the client.
- Required advice depends on a number of factors, including the noncitizen’s current immigration status and immigration history, his prior criminal record, and the pending charge.
- The possibility that immigration officials will not apprehend a defendant does not relieve defense counsel from providing specific and accurate advice.
  - Note: Justice Cordy in his dissent alludes to the fact that the majority does not address the likelihood of apprehension by immigration authorities and whether or not such likelihood of enforcement must be discussed with the client. While speculation regarding the likelihood of avoiding apprehension does not relieve defense counsel of the obligation to explain what immigration law requires, it may be valuable for defense counsel to understand the methods by which immigration authorities are enforcing immigration laws. For at least a decade, immigration authorities have made the apprehension and removal of so-called “criminal aliens,” defined as noncitizens who have had any contact with the criminal justice system, a top priority. Immigration is continuing to improve methods of apprehension so the likelihood of eventual apprehension is high and continues to increase, even for those who avoid criminal custody. The risk of apprehension depends, at least in part, on the particular circumstances of the noncitizen. For more detailed information about immigration enforcement, see the amicus brief filed by the IIU in *DeJesus* at Part II. [http://www.ma-appellatecourts.org/display\\_docket.php?dno=SJC-11392](http://www.ma-appellatecourts.org/display_docket.php?dno=SJC-11392).

- Immigration advice must be explained to noncitizen clients in a manner that the client can understand, taking into account the client's particular circumstances, level of education, language comprehension, etc.

The *DeJesus* decision makes clear that defense counsel must provide detailed advice to noncitizen clients about the specific immigration consequences stemming from their cases. While this decision may increase the responsibility of criminal defense attorneys to understand and provide immigration advice to their noncitizen clients, the IIU remains available to provide individual, case-specific advice to all court-appointed defense counsel in Massachusetts to assist counsel with their obligations under the 6<sup>th</sup> Amendment and art. 12.