

The Commonwealth of Massachusetts
Committee for Public Counsel Services
Immigration Impact Unit
21 McGrath Highway, Somerville, MA 02143

TEL: 617-623-0591
FAX: 617-623-0936

ANTHONY J. BENEDETTI
CHIEF COUNSEL

WENDY S. WAYNE
DIRECTOR

Duties of Defense Counsel Representing Noncitizens in Massachusetts
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In 2010, the U.S. Supreme Court ruled that failure of a criminal defense attorney to advise a noncitizen client of the impact that a criminal disposition will have on his immigration status constitutes ineffective assistance of counsel. *Padilla v. Kentucky*, 559 U.S. 356 (2010). Since then, the Supreme Judicial Court has decided a number of significant cases clarifying the extent of the duty in Massachusetts. Below is a brief summary of the case law detailing defense counsel’s duties vis-à-vis a noncitizen client in Massachusetts.

1. Duty to inquire about defendant’s immigration status

Defense counsel must make a “reasonable inquiry” of the client to determine, when possible, the client’s immigration status. *Commonwealth v. Lavrinenko*, 473 Mass. 42, 52 (2015). The SJC in *Lavrinenko* clarified that it is not the client’s responsibility to tell defense counsel that she is a noncitizen; defense counsel must affirmatively investigate whether the client is a U.S. citizen, and if not, determine the client’s specific immigration status, including whether the defendant was admitted into this country as a refugee or has been granted asylum. If a client is unsure of her status, a “reasonable inquiry” may include “an inquiry of family members of the client.” *Id.* at 52 n. 14.

Without determining the client’s specific immigration status, defense counsel “cannot properly evaluate the likelihood that the defendant will face immigration consequences, investigate potential avenues of relief, minimize such consequences through plea negotiations, or understand how highly the defendant values staying in the United States.” *Id.* Failure to make a “reasonable inquiry” is sufficient to satisfy the deficient performance prong of the ineffective assistance analysis. *Id.* at 54.

2. Duty to provide complete and accurate advice

When representing a noncitizen criminal defendant, counsel must provide complete and accurate advice as to the immigration consequences resulting from the criminal case. *Commonwealth v. DeJesus*, 468 Mass. 174, 181 (2014). No standard warning will satisfy counsel's duty, as each case presents different circumstances depending on the defendant's immigration status, prior record, and the particular consequences of the pending criminal charges. *Id.* at 181 n.5. Merely reading the warning on the defendant's waiver of rights form, which mirrors the judicial warning required by M.G.L. ch. 278, §29D, is not sufficient. *Lavrinenko*, 473 Mass. at 54.

There is a distinction in the case law between "clear" and "unclear" immigration consequences. The U.S. Supreme Court in *Padilla v. Kentucky* first distinguished between "clear" and "unclear" immigration consequences in describing different levels of advice that defense counsel is required to provide noncitizen clients. 559 U.S. at 357. The SJC adopted the same reasoning in *DeJesus* and concluded that advice must be clear and precise when the immigration consequences are equally clear. 468 Mass. at 181-182. Telling a defendant only that he will be "eligible for deportation" when his deportation will be virtually certain if he pleads guilty to an "aggravated felony" does not constitute effective representation. *Id.* Further, when the consequence is clear but not certain to happen, the SJC has nevertheless held that "the substantial risk of losing a viable opportunity for discretionary relief is a clear consequence of the defendant's plea..., and the consequence is no less clear because it is a risk rather than a certainty." *Lavrinenko*, 473 Mass. at 63 n.25.

Ultimately, what is 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. Required advice encompasses an analysis of whether a disposition will make a defendant deportable, whether it will make a defendant inadmissible, and whether the defendant would have any available defense to removal from the U.S. While it is not clear how far defense counsel must go when exploring available defenses to removal, it is clear from the majority's decision in *DeJesus* 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. Further, when advice about immigration consequences is conveyed, it must be specific and accurately convey what the law requires, not only statements about the probability of apprehension by immigration officials. The possibility that immigration officials will not apprehend a defendant does not relieve defense counsel from providing specific and accurate advice.

3. Duty to research or seek expert advice about immigration consequences

The SJC has recognized that defense counsel may not be experts in immigration law, but expects attorneys "either to research the applicable immigration law or to seek guidance from an attorney knowledgeable in immigration law." *Lavrinenko*, 473 Mass. at 54 n. 15. The IIU is available to provide individual, case-specific advice to all court-appointed defense counsel in Massachusetts to assist counsel with their obligations under the 6th Amendment and art. 12.

4. Duty to provide advice in a manner the client can understand

The *DeJesus* decision makes clear that defense counsel must provide detailed advice to noncitizen clients about the specific immigration consequences stemming from their cases in a manner that the client can understand, taking into account the client's particular circumstances, such as level of education and language comprehension. 468 Mass. at 181 n. 5.

5. Duty to advise and advocate at every stage of a case

The SJC has held that trial counsel must advise noncitizen defendants of immigration consequences prior to deciding whether to go to trial, prior to admitting sufficient facts, or prior to pleading guilty. *Commonwealth v. Marinho*, 464 Mass. 115, 124-126 (2013) (“*Padilla* imposes on defense counsel a duty to inform a noncitizen client that conviction, whether by plea or by trial, may carry adverse immigration consequence”). Counsel is not relieved of the duty to provide concrete, specific advice simply because a case will go to trial.

Further, defense counsel has a duty to advocate in plea negotiations and to raise the immigration consequences with the prosecutor where it is appropriate to do so and doing so may result in a more favorable plea. Further, defense counsel has a duty to advocate at sentencing by raising immigration consequences with the court where appropriate and by requesting a sentence that avoids or mitigates immigration consequences for a client. For example, in some cases, it may be important for counsel to advocate for a 364 day sentence rather than a year, or to advocate that a sentence be tied to a particular count of a criminal complaint rather than another. Defense counsel's failure to advocate in plea negotiations or at sentencing to minimize immigration consequences is sufficient to constitute deficient performance. *Id.* at 127-128.