



The Commonwealth of Massachusetts

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Immigration Case Notes for Massachusetts Criminal Defense Attorneys

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Massachusetts Supreme Judicial Court

Commonwealth v. Valdez, 475 Mass. 178 (2016)

In *Valdez*, the SJC interpreted the remedy provided in the “alien warnings” statute at M.G.L. ch. 278, § 29D. That rule permits a person to withdraw a plea if he was not given the proper warning and he can show that his plea “may have” one of the enumerated consequences about which he was not warned. The question in *Valdez* was what a defendant who did not receive the proper warnings regarding exclusion from admission must show to establish prejudice – to show that his conviction “may have” such a consequence. [NOTE: Since changes to federal law in 1996, exclusion is now referred to as “inadmissibility.”] The Court has previously held that a defendant must show “more than a hypothetical risk” that the consequences will occur. Where the consequence is deportation, the Court has held an individual must show that the government has taken some step towards his removal.

In *Valdez*, the Court found that the standard for establishing prejudice when the consequence is deportation is inappropriate when the immigration consequence at issue is “exclusion” or denial of admission. After reviewing the process by which an individual would be found inadmissible (and thus excluded from the U.S.), the Court concluded that it is “virtually inevitable that an individual who is ineligible for admission based on a criminal conviction...will be deemed inadmissible upon arrival.” *Valdez*, at 14. Because of this virtual inevitability, the Court held that a defendant satisfies his burden to show more than a “hypothetical risk” of exclusion by showing that “(1) he has a bona fide desire to leave the country and reenter, and (2) that, if the defendant were to do so, there would be a substantial risk that he or she would be excluded...because of his or her conviction.”

Significantly, the Court makes clear that although a defendant must show more than a “hypothetical risk” that the enumerated consequence will take place, a defendant need not be placed in removal proceedings based on inadmissibility in order to meet his burden.