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PRACTICE ADVISORY¹

ZEMENE V. CLARKE: SUPREME COURT OF VIRGINIA ADDRESSES SCOPE OF DEFENSE ATTORNEY OBLIGATIONS TO ADVISE NONCITIZEN CLIENTS

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March 6, 2015

On February 26, 2015, the Supreme Court of Virginia in *Zemene v. Clarke*, No. 140719 (Va. 2015), addressed the scope of a criminal defense attorney's obligation to advise noncitizen clients about the potential negative immigration consequences that may result from the disposition of a criminal case. *Zemene* emanates from the United States Supreme Court's decision in *Padilla v. Kentucky*, which held that criminal defense attorneys are constitutionally obligated to advise their clients regarding the deportation consequences of a plea. 559 U.S. 356 (2010). This Practice Advisory explores the holding in *Zemene*, which now governs the constitutional obligations of criminal defense attorneys in Virginia who represent noncitizen clients. The decision is of particular importance because the Supreme Court of Virginia has not previously analyzed the requirements of the constitutional obligation addressed in *Padilla* in a published opinion.²

Defense attorneys should note that *Zemene* articulates a broad view of an attorney's obligation to investigate a client's immigration history, advise her client about immigration consequences, and attempt to negotiate a plea bargain that avoids negative immigration consequences. Similarly, the court takes a broad view of the circumstances in which a noncitizen will be prejudiced as a result of negative immigration consequences for the purposes of an ineffective assistance of counsel claim under *Strickland v. Washington*. 466 U.S. 668 (1984).

FACTUAL BACKGROUND

The appellant, Michael Zemene, came to the United States in 2000 and became a Lawful Permanent Resident (aka "green card holder") in 2005. In 2012, he was arrested on allegations of shoplifting beer valued at \$33. During his first meeting with his criminal defense attorney, Mr.

¹ This practice advisory does not constitute legal advice. It is intended for the use of legal professionals and is not meant to serve as a substitute for a lawyer's obligation to conduct independent analysis and provide legal advice tailored to the facts and circumstances of a client's case.

² In February 2014, the Supreme Court of Virginia issued an unreported decision in *Commonwealth v. Barrera*, No. 130772 (Va. 2014) (the decision can be accessed [here](#)), that primarily addresses the prejudice prong of *Strickland v. Washington*, 466 U.S. 688 (1984), in connection with an ineffective assistance claim based on *Padilla*. The Supreme Court of Virginia also addressed *Padilla* in a decision finding that a claim of ineffective assistance of counsel brought under *Padilla* could not constitute an error of fact that would allow for a remedy under writ of coram vobis. *Commonwealth v. Morris*, 281 Va. 70 (2011).

Zemene informed his attorney he was not a U.S. citizen but had a green card. On the day the case was set for trial, Mr. Zemene's attorney informed him that the government had dropped the failure to appear charge and had offered a plea agreement in which Mr. Zemene would plead guilty to petit larceny in exchange for a 12 month suspended sentence. Mr. Zemene's attorney told him this was the best deal he could get for him. There was no discussion of immigration consequences. Believing he had no other options, Mr. Zemene agreed to the deal and in 2013 pled guilty to Va. Code 18.2-96, petit larceny, with a 12 month sentence entirely suspended.

Several months later, Immigration and Customs Enforcement (ICE) detained Mr. Zemene and placed him in removal proceedings on the grounds that his petit larceny conviction constituted an "aggravated felony."³ He was subsequently ordered removed by an Immigration Judge and his Lawful Permanent Resident status terminated, although his removal was formally "withheld" due to the likelihood that Mr. Zemene would be persecuted if returned to Ethiopia, his country of origin.

Mr. Zemene filed a petition for writ of habeas corpus in the Circuit Court of Fairfax County, alleging that he was deprived of the effective assistance of counsel when his defense attorney failed to advise him of the immigration consequences of his plea. He alleged that this ineffective assistance prejudiced him because, had his attorney been informed regarding the immigration consequences of the offered plea, he would likely have been able to negotiate an alternative plea deal avoiding the risk of removal. Mr. Zemene further claimed that even if he could not have gotten a better deal he would have gone to trial and risked incarceration to avoid the immigration-related risks. The circuit court sustained the Commonwealth's motion to dismiss the petition, basing its decision largely on the fact that Mr. Zemene had not stated a "claim of actual innocence or articulation of any plausible defense" in his petition.

On appeal, the Supreme Court of Virginia reversed the circuit court judgment, holding that the lower court had applied an incorrect standard in determining whether Mr. Zemene was prejudiced by his attorney's failure to advise him of the immigration consequences of his plea.

ZEMENE'S HOLDING – EFFECTIVE ASSISTANCE OF COUNSEL UNDER PADILLA

The Court undertook the analysis required by *Strickland v. Washington*, 466 U.S. 668 (1984), in considering Mr. Zemene's appeal. The *Strickland* analysis involves a two-pronged inquiry: (1) whether counsel's performance fell below an objective standard of reasonableness; and (2) whether the defendant was prejudiced by counsel's deficient performance.

Based on the facts presented, the Court found that Mr. Zemene had laid out sufficient allegations to satisfy *Strickland's* "performance" prong. In making its finding, the Court identified four critical steps that Mr. Zemene's attorney should have taken, but did not, in order to ensure that the representation of his client was objectively reasonable:

- 1) Undertake to learn "the precise nature" of the client's immigration status;

³ This advisory does not address the specific immigration penalties at issue in Mr. Zemene's case. Please note, however, that in December 2014 the Fourth Circuit Court of Appeals ruled in *Omargharib v. Holder*, Case No. 13-2229, that Virginia's grand larceny statute does not constitute a "theft" aggravated felony for immigration purposes, a ruling that should extend to Virginia petit larceny. For more information see the CAIR Coalition Practice Advisory on the *Omargharib* decision, available [here](#).

- 2) Determine if there are “potential negative consequences” to the client’s immigration status arising from a contemplated plea;
- 3) Broach the subject of any potential immigration consequences with the Commonwealth during plea negotiations; and
- 4) Discuss with the client the likelihood of the potential negative consequences that will flow from the plea.

Based on the Court’s ruling, defense attorneys should use these four steps as a guide for what constitutes constitutionally effective representation of noncitizen clients. The Court did not rule that these precise steps necessarily apply in every case and, therefore, a different approach may be required depending on the circumstances. As a general matter, however, *Zemene* appears to take a broad view of “potential immigration consequences” and the need to understand, and defend against, those consequences.

The Court in *Zemene* further stated that determining whether a client has been prejudiced by his attorney’s ineffective assistance, satisfying the second prong of the *Strickland* analysis, turns on whether a decision to reject the plea bargain would have been objectively rational under the circumstances. In analyzing prejudice, the *Zemene* Court emphasized the severe nature of immigration consequences, such as the detention and deportation proceedings faced by Mr. Zemene. In the face of such penalties, the Court found, the existence of evidence sufficient to establish guilt does not preclude a finding of prejudice. The Court further emphasized that Mr. Zemene “need not demonstrate a likelihood of acquittal at trial. Rather, the question is whether counsel’s constitutionally ineffective performance **affected the outcome of the plea process.**” (emphasis added). The Court ultimately agreed with Mr. Zemene on the issue of prejudice, holding, “the rationality of a decision whether to accept or reject a plea agreement **must include a properly advised defendant’s desire to avoid a negative impact on his immigration status** ... when objectively viewed, it is difficult even to imagine that [Mr. Zemene would not have rejected the plea and sought a new agreement or would have gone to trial] especially in light of the fact that with respect to his immigration status he faced no worse consequence by going to trial and stood to gain a significant benefit if he obtained a sentence of even a single day less than the maximum.” (emphasis added).

The Court also clarified that the Immigration Judge’s grant of withholding of removal did not render Mr. Zemene’s claim to prejudice “speculative.” Considering that Mr. Zemene was stripped of his Lawful Permanent Resident status and granted only a temporary form of relief that could be taken away in an exercise of discretion, the Court stated, “[t]here is nothing speculative about the actual and potential loss of civil liberties that Zemene faces as a result of his conviction and sentence for petit larceny.” **Accordingly, the Court’s decision strongly suggests that, under *Strickland*, prejudice to a noncitizen results from both removal from the United States and ineligibility for defenses or other immigration benefits that impact a noncitizen’s immigration status.**

For any questions about this advisory, please contact Morgan Macdonald at morgan@caircoalition.org. For further information about CAIR Coalition’s work on the immigration consequences of crimes, please visit [this](#) page.