

**STATE OF MICHIGAN**  
**IN THE [REDACTED] CIRCUIT COURT FOR [REDACTED] COUNTY**

State of Michigan,

Plaintiff,

[REDACTED]

Vs.

HON.: [REDACTED]

[REDACTED],

Defendant.

[REDACTED]

Laurence H. Margolis (P69635)  
*Margolis Law P.C.*  
Attorney for Defendant  
214 S. Main St. Ste. 202  
Ann Arbor, MI. 48104  
(734) 994-9590

BRIEF IN SUPPORT OF MOTION TO WITHDRAW PLEA  
AND VACATE CONVICTIONS PERSUANT TO MCR 6.310(C)

## STATEMENT OF FACTS

██████████ is nineteen years old and was born in ██████████. He moved to the United States at the age of seven when his mother married ██████████, an American citizen. ██████████ does not know the identity of his biological father and has no immediate family in ██████████ he has lived in ██████████ County for most of his life. Prior to his arrest ██████████ resided with his step-father ██████████ his mother, ██████████, his brother ██████████ and his American-born half-siblings, ██████████ and ██████████. ██████████ attended ██████████ High School and elementary and middle schools in ██████████ and ██████████. He often went by the nickname “██████████” which was easier for his friends and classmates to pronounce.

██████████ eventually became friends with a group of teens who frequently got into trouble. In December of ██████████, his friend ██████████ had the keys to his grandparents’ house while ██████████ grandparents were in Florida. ██████████ invited ██████████ and some of his other friends from high school to his grandparent’s house, where they partied and trashed the residence. After they were discovered, ██████████ and their friend ██████████ took blankets, food, and ██████████ grandfather’s shotgun from the residence and drove to Florida. Their truck broke down in Georgia while they were driving back, so they abandoned it and drove off in another truck that they found parked, with the keys inside, in a nearby field. After driving back to Michigan, the group abandoned this vehicle.

██████████ was arrested a few weeks later after ██████████ picked him and ██████████ up in a vehicle that had been stolen from a landscaping company. ██████████ was also riding in the stolen vehicle. They were pulled over by ██████████ Police, and ██████████ and the others fled from the traffic stop. They were all apprehended the following day.

On May ██████████ ██████████ pled guilty to six felonies in connection with the above-described incidents and other similar incidents involving the same group of teens. At the time he entered his guilty plea, ██████████ was not aware that being convicted of two or more Crimes Involving Moral Turpitude (CIMTs) would result in automatic loss of his permanent-resident status and deportation to ██████████ a country that he hardly remembers and has no significant ties to. If ██████████ had known that there was no chance that he would be able to legally remain in the United States if he accepted the plea deal, he would not have pled guilty and would have insisted on a trial.

I. COUNSEL’S ASSISTANCE WAS INEFFECTIVE UNDER *PADILLA V. KENTUCKY*

In the landmark case *Padilla v. Kentucky*, 599 US 356 (2010), the Supreme Court held that attorneys who do not accurately advise their noncitizen clients of the immigration status consequences of a guilty plea have failed to provide constitutionally-adequate assistance of counsel. Under *Padilla*, merely advising the noncitizen client of the possibility of adverse immigration consequences is not sufficient; Jose Padilla had discussed the possibility of deportation with his trial counsel and was aware that he could be deported. *Com. v. Padilla*, 253 S.W.3d 482, 483 (2008). Instead, the Court held that when adverse immigration consequences are certain to result from the guilty plea, counsel must inform the client of the effects that the guilty plea will have on the client’s immigration status. Specifically, the court held:

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“There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward (as it is in many of the scenarios posited by Justice ALITO), a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. **But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.**”

*Padilla* at 369 (emphasis added).

The following excerpt, taken from ICLE’s Michigan Criminal Procedure, September 2012 Update, at chapter 8.5 (page 210) addresses the requirements in Michigan for criminal attorney’s advising their clients:

All of the possible consequences of a plea should be discussed with the client before entry of the plea. However, you must be cautious not to provide absolute information or make promises as to collateral matters, such as driver’s license sanctions, employment consequences, or the impact on occupational licenses. You must be careful of immigration consequences, particularly in light of the ruling in *Padilla v Kentucky*, \_\_\_ US \_\_\_, 130 S Ct 1473 (2010) (see §2.18). **Under *Padilla*, you must advise a criminal defendant of the deportation consequences of a guilty plea where the law is clear,** such as deportation for a controlled substance offense under 8 USC 1227(a)(2)(B)(i). In cases where the impact is not as certain, you “need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” *Padilla*, 130 S Ct at 1483. **You should have a working knowledge of potential immigration consequences and refer your client to an immigration attorney if the situation calls for it.** Note that the Michigan Court of Appeals has held that the rule announced in *Padilla* may be applied prospectively only. *People v Gomez*, 295 Mich App 411, \_\_\_ NW2d \_\_\_ (2012).

Jose Padilla was a US Permanent Resident who pled guilty to a drug trafficking offense.

*Padilla v. Kentucky*, 559 U.S. 356, 359 (2010). Permanent Resident status is automatically revoked upon conviction of a drug trafficking offense and the convicted alien is immediately deportable. *Id.* at 368. Padilla’s trial counsel was required to inform him that he would automatically lose his Permanent Resident status and be deported if he pled guilty, but instead

merely advised his client that deportation was possible but unlikely. *Id.* at 359. The Court found that this constituted ineffective assistance of counsel.

Like Jose Padilla, [REDACTED] was a Permanent Resident prior to his convictions. A Permanent Resident convicted of two or more Crimes Involving Moral Turpitude (CIMTs) is immediately deportable. *See* 8 U.S.C. 1227(a)(2)(A)(ii), (“[a]ny alien who at any time after admission is convicted of two or more crimes involving moral turpitude . . . is deportable.”) The immigration consequences of conviction in [REDACTED] case were clear. [REDACTED] attorney, former counsel, never told his client that accepting the plea deal would make him immediately removable. By failing to inform his client of the **specific, guaranteed** deportation consequence of accepting the offered plea agreement, former counsel was ineffective as a matter of law.

## II. [REDACTED] PLEA WAS NOT ENTERED KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY

Because guilty pleas involve the waiver of constitutional rights, they “not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences” in order to comply with the Due Process requirements of the Fourteenth Amendment. *People v. Cole*, 491 Mich. 325, 332-33 (2012). A defendant’s right to know the likely consequences of his decision to plead guilty is also protected by MCR 6.302. “An important focus of MCR 6.302 is to ensure that the defendant who has entered into a sentencing agreement has made a knowing, understanding, and informed plea decision.” *People v. Brown*, 492 Mich. 684, 693 (2012).

Prior to *Padilla*, Michigan courts drew a distinction between “direct” and “collateral” consequences of a guilty plea, requiring the defendant to be advised only of the direct

consequences such as the maximum possible sentence. *See, e.g. People v. Osaghae*, 460 Mich. 529 (1999). The Court in *Padilla* held that “deportation is an integral part –indeed, sometimes the most important part –of the penalty imposed on noncitizen defendants” and that “[t]he collateral versus direct distinction is thus ill suited to evaluating a *Strickland* claim concerning the specific risk of deportation.” *Padilla* at 364 and 366. Since *Padilla*, the direct vs. collateral test has been deemphasized and Michigan courts have expanded the types of adverse consequences that defendants must be made aware of before offering guilty pleas. *See, e.g. People v. Brown*, 492 Mich. 684 (2012), *People v. Fonville*, 291 Mich. 363 (2011).

Revocation of Permanent Resident status and deportation to [REDACTED] are more severe consequences than any criminal sanction that Kirakorn was likely to receive as a 19-year-old, nonviolent offender. If [REDACTED] is deported, he will be separated from his parents and siblings and permanently exiled to a third-world country that he hardly remembers. If he had known that deportation was not merely a possibility, but rather a **certain consequence** of accepting the plea agreement, he would not have pled guilty. [REDACTED] plea was not a “knowing, voluntary and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences,” rendering it constitutionally invalid.

III. [REDACTED] CONSTITUTIONAL RIGHT TO CONFLICT-FREE COUNSEL WAS VIOLATED WHEN HIS ATTORNEY ALSO REPRESENTED ONE OF MR. [REDACTED] CO-DEFENDANTS WITHOUT MR. NISHIKAWA’S KNOWLEDGE OR PERMISSION

[REDACTED] defense attorney concurrently represented his co-defendant [REDACTED] without [REDACTED] knowledge or permission. His decision to represent one of [REDACTED] co-defendants without seeking his client’s informed consent to the concurrent representation was a clear violation of Michigan Rule of Professional Conduct 1.7(b)(2). *See also* MPRC 1.7

*Comment: CONFLICTS IN LITIGATION* (“[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant.”)

██████████ co-defendants with respect to his instant convictions were ██████████ ██████████ and ██████████. The co-defendant represented by ██████████ defense attorney pled guilty to several weapons and assault-related felonies on May ██████████ and received a probationary sentence under HYTA.

██████████ presentence investigation report (PSIR) indicates that one co-defendant, ██████████ ██████████, told police that ██████████ sold a stolen handgun to ██████████. Another non-party witness indicated to police that he had overheard ██████████ and ██████████ talking about ██████████ purchasing a stolen firearm from ██████████. However, when ██████████ himself was questioned by police, he claimed that he had purchased the firearm from ██████████ ██████████ admitted involvement in the theft of the firearm as part of his plea agreement.

In *Holloway v. Arkansas*, 425 U.S. 475, 490 (1978), the Supreme Court held that a trial court’s denial of a criminal co-defendant’s timely request for separate counsel is a per-se violation of the Sixth Amendment and warrants automatic reversal. “[I]n a case of joint representation of conflicting interests the evil – it bears repeating – is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process.” *Id.*

While a trial court’s failure to investigate possible conflicts of interest in the absence of an objection to concurrent representation by a defendant or his attorney does not require automatic reversal, *People v. Kirk*, 119 Mich.App. 599, 603 (1982), ██████████ could not have timely objected to the concurrent representation of his co-defendant because at the time he pled

guilty, he was not aware that his attorney was also representing [REDACTED]. There is a very high probability that conflicts of interest will arise when a single attorney represents two co-defendants, each of whom may have information about the criminal conduct of the other, in parallel plea negotiations with the government. The concurrent representation “may have precluded defense counsel . . . from exploring possible plea negotiations and the possibility of an agreement to testify for the prosecution . . . prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the culpability of one by emphasizing that of another. Examples can be readily multiplied.”

*Halloway* at 490.

[REDACTED] and [REDACTED] entered their guilty pleas within one week of each other on related criminal charges. [REDACTED] was charged with receiving a firearm which [REDACTED] allegedly stole, and then using the stolen firearm in assaultive crimes. While [REDACTED] received a probationary sentence under the Holmes Youthful Trainee Act, [REDACTED] was sentenced to 3-10 years in prison. [REDACTED] sentence was longer than that received by any of his four co-defendants.

[REDACTED] was not present during the plea negotiations between his attorney and the prosecutor in his or [REDACTED] cases, so for [REDACTED] to “assess the impact of a conflict of interests on the attorney’s opinions, tactics, and decisions in plea negotiations would be virtually impossible.” *Halloway* at 491. However, at a minimum, former counsel undisclosed concurrent representation of [REDACTED] constituted an actual conflict of interest, because it effectively precluded [REDACTED] from exploring the possibility of an agreement to testify against [REDACTED] in exchange for a reduced sentence. A criminal defendant is entitled to automatic reversal



if he demonstrates that his counsel “actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer’s performance.” *People v. Smith*, 456 Mich. 543, 557 (1998).

12. For the above reasons, [REDACTED] respectfully requests that this court:
- a) Permit Defendant to withdraw his plea, pursuant to MCR 6.310(C);
  - b) If deemed necessary, grant a hearing on this matter, including an evidentiary hearing on any contested issues of fact;
  - c) Accept a renegotiated plea;
  - d) Grant such other further relief as the Court deems just and efficient under the circumstances.

Respectfully submitted,

By: \_\_\_\_\_  
Laurence H. Margolis (P69635)  
*Margolis Law, P.C.*

Date: [REDACTED]

**CERTIFICATE OF SERVICE**

I, Laurence H. Margolis, attorney for [REDACTED] do hereby certify that I have on this day delivered by facsimile and hand delivery, a true and correct copy of the Defendant's Brief in Support of Motion to Withdraw Plea and Vacate Convictions and this Certificate of Service to

[REDACTED]

This the [REDACTED].

\_\_\_\_\_  
Laurence H. Margolis (P69635)  
Attorney for Defendant