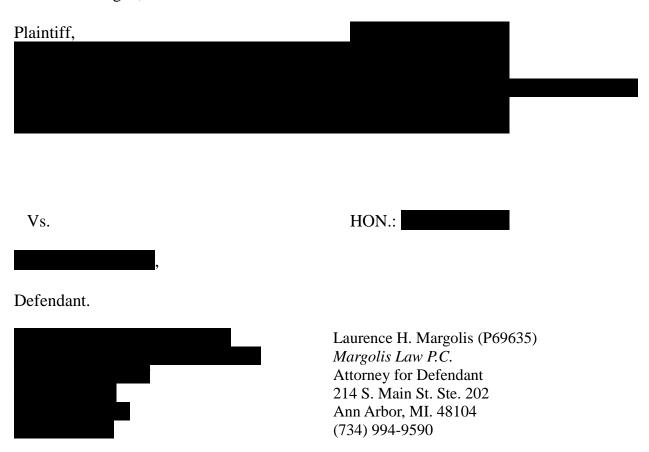
STATE OF MICHIGAN IN THE CIRCUIT COURT FOR COUNTY

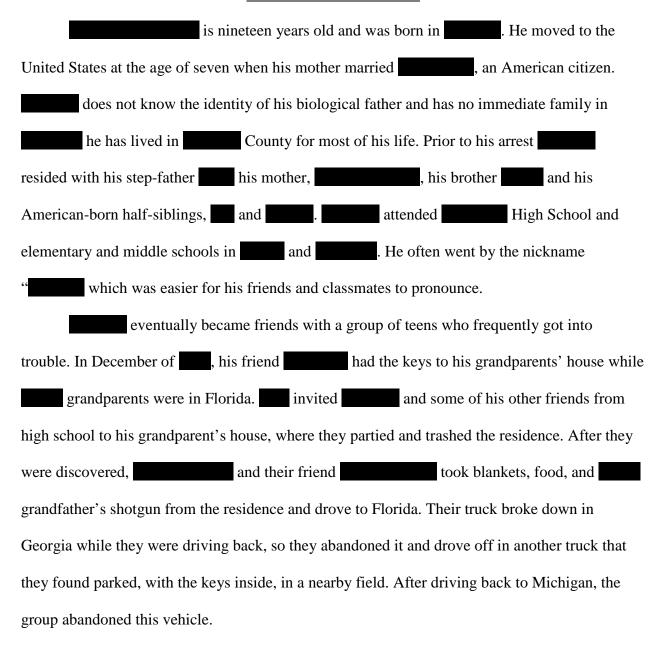
State of Michigan,



BRIEF IN SUPPORT OF MOTION TO WITHDRAW PLEA

AND VACATE CONVICTIONS PERSUANT TO MCR 6.310(C)

STATEMENT OF FACTS



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, 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 case were clear. 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.

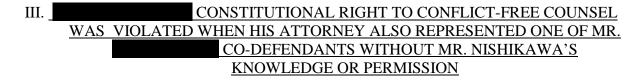
II. PLEA WAS NOT ENTERED KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY

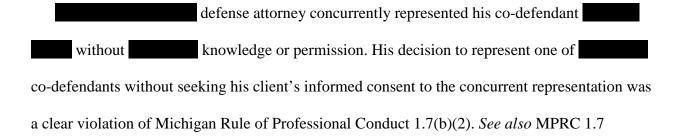
Because guilty pleas involve the waiver of constitutional rights, they "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences" in order to comply with the Due Process requirements of the Fourteenth Amendment. *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

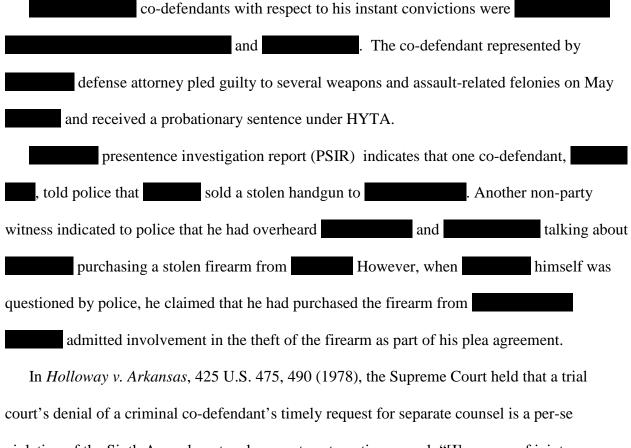
consequences such as the maximum possible sentence. *See*, *e.g. People v. Osaghae*, 460 Mich. 529 (1999). The Court in *Padilla* held that "deportation is an integral part –indeed, sometimes the most important part –of the penalty imposed on noncitizen defendants" and that "[t]he collateral versus direct 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 are more severe consequences than any criminal sanction that <u>Kirakorn</u> was likely to receive as a 19-year-old, nonviolent offender. If 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. In plea was not a "knowing, voluntary and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences," rendering it constitutionally invalid.





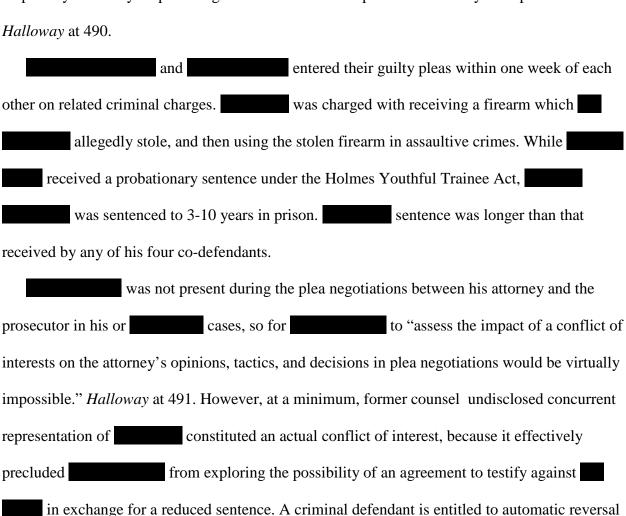
Comment: CONFLICTS IN LITIGATION ("[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one co-defendant.")



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 There is a very high probability that conflicts of interest will arise when a single attorney represents two codefendants, 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.



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,	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,
		R _V .

Laurence H. Margolis (P69635)

Margolis Law, P.C.

Date:

CERTIFICATE OF SERVICE

I, Laurence H. Margolis, attorney for 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



Laurence H. Margolis (P69635) Attorney for Defendant