Via Standard & Electronic Mail
Defense Attorney

Re: ***State v. XXXXXX***
XXXXX County Case No. XX-CF-XXXX

Dear Defense Attorney:

I have been retained by Defendant to analyze the immigration consequences of the pending charges in the above-captioned matter. As outlined below, each count is a deportable offense individually. Defendant's deportation is assured if he is convicted of any of the seven counts.

In order for Defendant to avoid deportation and remain with his family in the U.S., I am recommending a proposed plea to multiple counts of second-degree recklessly endangering safety in violation of Wis. Stat. § 941.30.

For your convenience, I have included the relevant sections of Immigration & Nationality Act ("INA") as group Exhibit A.

IMMIGRATION HISTORY

Defendant was born in Mexico on XXXXX. He entered the U.S. lawfully at the age of 14 on a V visa, which is a visa that allows minors of pending immigration petitions to live with their parents in the U.S. until the petition can be processed and permanent residence granted. In Defendant's case, his father petitioned for him.

On XXXX, Defendant adjusted to lawful permanent residency. Both his parents are lawful permanent residents. His sisters are permanent residents as well. As a permanent resident, Defendant may live and work in the U.S. indefinitely unless deported for having been convicted of certain crimes.

Defendant's partner is a U.S. citizen. They have been together for nearly ten years. Defendant and ZZZZZ have a four-year old daughter.

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CRIMINAL RECORD

In XXXX, Defendant was charged in XXXXX County with multiple felonies and misdemeanors involving allegations of drug delivery and possession.

Defendant was previously convicted in XXXXX County case number XX-CM-XXXX for simple possession of marijuana.

IMMIGRATION CONSEQUENCES OF PENDING CHARGES

If Defendant is convicted of any of the pending counts, his deportation will be assured. Each count qualifies independently as a deportable offense as either an aggravated felony, under the generic statute for drug offenses, or under the child neglect provision of the INA.

A. Deliver of Cocaine (Counts 1, 2, and 3)

A permanent resident convicted of an aggravated felony is subject to deportation under 8 U.S.C. § 1227(a)(2)(iii). Delivery of cocaine is unquestionably an aggravated felony. Under 8 U.S.C. § 1101(a)(43), the term "aggravated felony" contains 27 definitions depending on the nature of the offense. One of these definitions is any conviction involving "illicit trafficking in a controlled substance . . . including a drug trafficking crime." *See* 8 U.S.C. §1101(a)(43)(B).

The terms "illicit trafficking" and "drug trafficking crime" under this statute are distinct. The term "drug trafficking crime" means a conviction that is punishable as a felony under the felony Controlled Substances Act. *See Lopez v. Gonzales*, 549 U.S. 47 (2006). In contrast, the illicit trafficking clause of the aggravated felony definition includes any state, federal, or qualified felony conviction involving the unlawful trading or dealing of any controlled substance as defined in section 102 of the Controlled Substances Act. *Matter of Sanchez-Cornejo*, 25 I&N Dec. 273, 274 (BIA 2010).

In order for an offense to qualify as an aggravated felony under this definition, it need only be a "drug trafficking crime" or an "illicit trafficking" offense. In the case of delivery of cocaine, it is both. Deliver of cocaine is a felony under the federal CSA. It also involves the unlawful trading or dealing of a controlled substance. Thus, delivery of cocaine in violation of Wisconsin law is an aggravated felony under both definitions of "illicit trafficking" and "drug trafficking." Defendant would therefore be subject to deportation under 8 U.S.C. § 1227(a)(2)(A)(iii).

An aggravated felony conviction all but assures deportation. As the Second Circuit put, "deportation today is an essentially certain, automatic, and unavoidable consequence of an alien's conviction for an aggravated felony." *U.S. v. Cuoto*, 311 F.3d 179, 190 (2nd Cir. 2002).

Delivery of cocaine would separately render Defendant deportable under the general deportation statute for drug convictions. *See* 8 U.S.C. §1227(a)(2)(B)(i).

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B. Possession of cocaine with intent to deliver (Count 4)

Like deliver of cocaine, possession of cocaine with intent is also an aggravated felony because it is a felony under the federal CSA as well as involving commercial dealing. S*ee also Ali v. Ashcroft*, 395 F.3d 722, 727-28 (7th Cir. 2005) (noting that conviction under Wis. Stat. §961.41(1m)(h)(1) for possession of THC with intent to deliver is a drug trafficking crime, and hence an aggravated felony under immigration law).

Possession with intent is separately a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i).

C. Possession of Cocaine, 2nd & Subsequent Offense (Count 5)

Whether treated as a second offense or not, possession of cocaine is a deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i). There is only one exception under the statute: a single offense for possession of marijuana of 30 grams or less for one's own use. Therefore, a single conviction for possession of cocaine is a deportable offense even if it is only a misdemeanor.

Furthermore, possession charged as second and subsequent offense under Wisconsin's recidivist drug statute will be construed as an aggravated felony by Immigration & Customs Enforcement. As previously stated, the term "drug trafficking crime" means any offense under the federal CSA that is a felony.

Under the federal CSA, a recidivist second possession offense is a felony. *See* 21 U.S.C. § 844(a). For that reason, the U.S. Supreme Court ruled that a state offense for second or subsequent possession may qualify as an aggravated felony because it corresponds to the felony recidivist provision under the federal CSA. *See Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010).

Possession of cocaine charged as a second and subsequent offense will be considered an aggravated felony in addition to being a deportable drug offense.

D. Possession of Drug Paraphernalia (Count 6)

Because drug paraphernalia "relates to" a controlled substance under the federal CSA, both the Board of Immigration Appeals and the federal circuit courts of appeal (including the Seventh Circuit Court of Appeals) have determined it is an inadmissible and deportable offense. *See, e.g., Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009); *Barma v. Holder*, 640 F.3d 749 (7th Cir. 2011); *Alvarez Acosta v. Att'y Gen of the U.S.*, 524 F.3d 1191 (11th Cir. 2008); *Lou-Le v. INS*, 224 F.3d 911 (9th Cir. 2000).

Recently, the Board of Immigration Appeals clarified that whether drug paraphernalia is a deportable offense depends on underlying facts. Specifically, the Board noted that possession of drug paraphernalia qualifies as a deportable offense if it was "associated with the manufacture, smuggling, or distribution of marijuana or with the possession of a drug other than marijuana." *Matter of Davey*, 26 I&N Dec. 37, 41 (BIA 2012) (**Ex. B**). In contrast, possession of drug

paraphernalia will not be a deportable only if it involves simple possession of marijuana of 30 grams or less for one's own personal use, such as a "marijuana pipe or rolling papers." *Id*.

In Defendant's case, the possession of drug paraphernalia is relating to the distribution of cocaine and therefore qualifies as a deportable offense.

E. Child Neglect (Count 7)

Child neglect is a deportable offense under the plain terms of the INA. Specifically, a conviction for "child abuse, *child neglect*, or child abandonment" is a deportable offense. 8 U.S.C. § 1227(a)(2)(E)(i) (emphasis added).

RECOMMENDATION

Defendant's deportation is assured if he is convicted of any of the pending counts. He would be deportable for having been convicted of an aggravated felony, a drug offense that does not involve simple possession of THC of 30 grams or less for his own use, or a crime of child neglect.

It is important to emphasize that the potential length of sentence is not the problem, but rather the nature of the offenses. If, for example, Defendant was convicted of any of the pending charges but only received probation, he would still be subject to deportation regardless of no jail time.

Defendant has lived in the U.S. since being a young teenager. His family is here in the U.S., not in Mexico. I understand that Defendant is particularly concerned about his young U.S. citizen daughter growing up without her father. The only options for Defendant to be able to remain in the U.S. with his parents, siblings, partner, and daughter are to either take his chances at trial or negotiate a plea agreement that does involve a drug or child-abuse related offense.

One alternative plea proposal is for Defendant to plead to multiple counts of second-degree recklessly endangering safety in violation of Wis. Stat. § 941.30. Upon reviewing the discovery, I believe there is a factual basis for such an amendment. When the police knocked on his door, Defendant was alleged to have run away from the door thus giving the police no option but to breach the front door with force, and presumably draw their weapons. As stated in the discovery, the police believed the act of running away presented "exigent circumstances where he could've been going to grab a weapon or destroy evidence." (**Ex. C**).

Multiple counts of recklessly endangering safety would be justified because there were multiple individuals who could have been harmed, including the individual police officers, Defendant's young daughter and partner.

Importantly, multiple convictions for recklessly endangering safety under this factual basis would not subject Defendant to deportation. Although reckless endangerment is a felony crime involving moral turpitude ("CIMT"), multiple CIMT convictions will not subject a permanent resident to deportation as long as the offenses arise out of a "single scheme of criminal misconduct." 8 U.S.C. § 1227(a)(2)(A)(ii).

Furthermore, Defendant should not be subject to removal under 8 U.S.C. § 1227(a)(2)(A)(i) falls outside five years of his admission to the U.S.

There are two important points to make about this proposal. First, the length of sentence will not result in Defendant's deportation. Thus, this proposal will not avoid significant prison time. It will, however, give Defendant an opportunity to remain with his family after his sentence is served.

Second, this plea proposal will provide an added incentive for Defendant to abide by the law in the future. Defendant is now aware that criminal conduct may result in his banishment and permanent separation from his family. Because he has already been convicted of a drug offense in case number XX-CM-XXXXX, a future drug conviction will assure his deportation. Only a single offense for possession of marijuana of 30 grams or less is excused under immigration law.

In addition, because second degree recklessly endangering safety is a CIMT, any future conviction that qualifies as a CIMT will result in Defendant's deportation under 8 U.S.C. § 1227(a)(2)(A)(ii). To put it differently, this proposed deal will put him on a short-leash. Any future problems with the law will assure his deportation to Mexico.

I will be contacting you shortly to discuss my analysis and recommendations in more detail. In the meantime, if you have any questions, please do not hesitate to contact me at (414) 962-7440.

Sincerely,

Davorin J. Odrcic

Encl.