

***Via Electronic Mail***

Defense Attorney

Re: ***State v. Defendant***  
**Case No. XX-CF-XXXX**

Dear Defense Attorney:

I have been retained to advise you regarding the potential immigration consequences of Defendant's sentence in the above-captioned matter. Defendant's pleas to burglary, theft, and simple possession of heroin will subject him to removal proceedings and mandatory immigration detention after completion of his sentence.

However, Defendant will be eligible for a discretionary form of relief in immigration court **unless** he is sentenced to one year or more on any of the burglary or theft counts. If he is sentenced to at least one year or more on any of the counts of burglary or theft, then Defendant will be subject to automatic deportation regardless of his length of residency in the U.S., family ties, military service, and other equitable factors.

Given this severe immigration consequence, I am recommending that Defendant requests a sentence structured to preserve his eligibility to seek discretionary relief in immigration court. This can be achieved by either consecutive sentences or more jail time on the possession of heroin conviction.

I have attached all of the relevant statutes under the Immigration & Nationality Act ("INA") as Exhibit A. The other exhibits further illustrate why a one year sentence or longer on a burglary or theft count will result in Defendant's automatic deportation.

## **IMMIGRATION HISTORY**

Defendant was born on XXXXX in XXXXX. He entered the U.S. on April 8, 1995 at the age of 12. He adjusted status to lawful permanent residency on December 11, 1995 through a petition filed by his U.S. citizen step-father. (**Ex. B**). Defendant served in the U.S. Armed Services from May of 2002 to June of 2004. He has lived in the U.S. continuously since first entering in 1995. His mother became a U.S. citizen in January of 2009. However, Defendant did not apply for U.S. citizenship.

Although as a permanent resident Defendant may live and work in the U.S. indefinitely, he can be subject to deportation if convicted of certain crimes. *See generally* 8 U.S.C. §1227(a)(2)(A).

## **CRIMINAL HISTORY**

Based on my review of the CCAP records, Defendant has previous convictions and ordinance violations for OWI and disorderly conduct. Standing alone, these offenses do not carry any immigration consequences. An OWI offense (as well as multiple OWI offenses) is not a crime involving moral turpitude under immigration law. *Matter of Lopez-Meza*, 22 I&N Dec. 1188, 1194 (BIA 1999) (Simple OWI not a deportable offense); *Matter of Torres-Varela*, 23 I&N Dec. 78, 82-86 (BIA 2001) (Multiple OWI offenses not a deportable offense). Likewise, a disorderly conduct conviction ordinarily does not carry any immigration consequence.

In the present matter, Defendant was charged with multiple counts of burglary, two drug-related offenses, and one count for felony theft. Defendant pleaded guilty to three counts of burglary, one count of simple possession of narcotic drugs (heroin), and one count of theft.

It is my understanding that the author of the PSI is recommending up to two years of initial confinement on the burglary counts and extensive probation for the drug possession and theft convictions.

## **ANALYSIS**

A lawful permanent resident convicted of a deportable offense may not necessarily be removed from the United States if he is eligible for an equitable form of relief called cancellation of removal. In order to be cancellation eligible, an applicant must be a (1) permanent resident for at least five years; (2) resided in the U.S. continuously for at least seven years after admission to the country; and (3) has not been convicted of an aggravated felony. 8 U.S.C. §1229b(a).

Although he is deportable due to his guilty pleas, Defendant meets the criteria for cancellation of removal unless he is sentenced to at least one year or more on a single count of burglary or theft.

### **A. IMMIGRATION CONSEQUENCES OF DEFENDANT'S PLEAS**

Regardless of his sentence, Defendant is subject to deportation proceedings before the Chicago Immigration Court. His conviction for possession of narcotics (heroin) renders him deportable pursuant to 8 U.S.C. §1227(a)(2)(B)(i). That provision renders a noncitizen deportable if convicted under any law or regulation "relating to a controlled substance." It is long settled that simple possession of heroin is a deportable offense. *See, e.g., Matter of Arias-Uribe*, 13 I&N Dec. 696 (BIA 1971); *Matter of Eng*, 12 I&N Dec. 855 (BIA 1968).

Although possession of heroin is a felony under Wisconsin law, it is not an aggravated felony under immigration law. In *Lopez v. Gonzales*, 549 U.S. 47 (2006), the Supreme Court held that a simple drug possession offense that is a felony under state law but a misdemeanor under federal law is not an aggravated felony under immigration law. Simple possession offenses under the federal Controlled Substances Act that are punishable as felonies are limited to recidivists, possession of crack cocaine, and possession of flunitrazepam. *See* 21 U.S.C. §844(a).

Defendant is also subject to deportation proceedings for having been convicted of multiple crimes involving moral turpitude (“CIMT”) that do not arise out of a single scheme of criminal misconduct. Both burglary and theft are unquestionably CIMTs. *See, e.g., Matter of Louissaint*, 24 I&N Dec. 754 (BIA 2009) (burglary of an occupied dwelling is a CIMT); *Matter of Jurado*, 24 I&N Dec. 29 (BIA 2006) (retail theft a CIMT). He is therefore deportable pursuant to 8 U.S.C. §1227(a)(2)(A)(ii).

Defendant’s offenses did not arise out of a single scheme of criminal misconduct. The Board of Immigration Appeals recently ruled that multiple forgery offenses that occurred in a **single day** did not arise out of single scheme of misconduct because the defendant had an opportunity dissociate himself from his enterprise and reflect on what he had done. *Matter of Islam*, 25 I&N Dec. 637 (BIA 2011). In Defendant’s case, the offenses occurred on **separate days**. They clearly did not arise from a “single scheme of criminal misconduct” as defined under immigration law.

## **B. POTENTIAL IMMIGRATION CONSEQUENCES OF DEFENDANT’S SENTENCE**

In addition to drug offenses and multiple CIMT offenses, a permanent resident may also be deportable for being convicted of an aggravated felony. 8 U.S.C. §1227(a)(2)(A)(iii). However, the crucial distinction is that an aggravated felony conviction prevents a permanent resident from requesting any equitable or discretionary relief before the immigration court.

The term “aggravated felony” is expressly defined under 8 U.S.C. §1101(a)(43) and includes twenty-seven definitions depending on the nature of the offense as well as the length of sentence. An aggravated felony includes “a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year.” 8 U.S.C. §1101(a)(43)(G). Importantly, it does not matter whether the sentence is imposed and stayed. The statute only requires a sentence of at least one year on a theft or burglary offense regardless if the time is actually served.

If Defendant is sentenced to one year or more on any of the individual burglary counts or the theft count, then he will have been convicted of an aggravated felony. Consequently, he will be ineligible for cancellation of removal and automatically deported. As the Second Circuit succinctly put it, “deportation today is an essentially certain, automatic, and unavoidable consequence of an alien’s conviction for an aggravated felony.” *U.S. v. Couto*, 311 F.3d 179, 190 (2<sup>nd</sup> Cir. 2002).

I have attached a redacted Notice to Appear (“NTA”) concerning a former client. (**Ex. C**). An NTA is the charging document in immigration court that outlines the allegations in support of the government’s assertion that a noncitizen is subject to removal.

The prior client was convicted of burglary in Wisconsin and sentenced to exactly one year. As correctly alleged in the NTA, he was therefore subject to removal pursuant to 8 U.S.C. §§1101(a)(43)(G) and 1227(a)(2)(A)(iii). Fortunately, I was able to modify his sentence to 364 days on the burglary conviction, thus making him eligible for cancellation of removal. The immigration judge ultimately granted that application.

I am also attaching an unpublished decision from the Board of Immigration Appeals. (**Ex. D**). In that case, the respondent was originally sentenced to one year on a burglary conviction. Accordingly, the respondent was convicted of an aggravated felony and thus ineligible for cancellation of removal. After modifying the sentence to 364 days, the respondent was able to vacate the removal order, reopen proceedings, and seek cancellation of removal.

Both of these exhibits demonstrate that a mere **one day** reduction of a one year sentence on a burglary conviction will have a dramatic effect on a permanent resident's ability to litigate his case in deportation proceedings. In contrast, a one-year sentence or more on a burglary or theft conviction will cause the most severe immigration consequences. Defendant will be convicted of an aggravated felony as defined under 8 U.S.C. §1101(a)(43)(G), and will be deported to XXXXX without any opportunity to present the equities in immigration court.

### **C. CANCELLATION OF REMOVAL**

If Defendant is able to preserve his eligibility for cancellation of removal, the immigration judge will weigh the positive factors in his case versus the negative ones. In deciding his application for cancellation of removal, the immigration judge will take into account Defendant's length of residence in the U.S., his family ties, his military service, as well as the hardship he would suffer if he was deported to XXXXX.

The unemployment rate in XXXXX is 40% and about 50% of the population fall below the poverty line. (**Ex. E**). Life expectancy for males is 61 years, which places XXXXX 176<sup>th</sup> in the world. XXXXX has also been experiencing political turmoil since 2007. Given the political and economic problems in XXXXX, and the fact that he has not lived there since a child, I believe Defendant will face considerable hardship if returned to XXXXX.

When applying for cancellation, Defendant will be required to explain the circumstances of his convictions. Since he will bear the burden of establishing his cancellation claim, Defendant cannot remain silent on his conviction record. He will need to explain to the satisfaction of the immigration judge why he committed these offenses, and why he deserves a second chance if granted cancellation of removal.

Defendant will be subject to mandatory immigration detention pursuant to 8 U.S.C. §1226(c). Based on my recent experience, Defendant should expect to be detained between four to six months while litigating his cancellation claim before the Chicago immigration court. I anticipate his immigration detention will begin immediately after his sentence is completed in this matter.

Cancellation of removal can only be granted once. 8 U.S.C. §1229b(c)(6). If Defendant is granted cancellation of removal, but is subsequently convicted of another deportable offense, then he will have no defense in a subsequent deportation proceeding before the immigration court.

Moreover, if Defendant's probation is revoked and he is re-sentenced to a year or longer on any of the burglary counts or theft count, then he will be subject to automatic deportation for having been convicted of an aggravated felony. In other words, Defendant will have an extra incentive

to successfully complete his probation if the immigration judge grants his cancellation of removal application. Unlike a U.S. citizen, a revocation and re-sentence could result in his deportation to XXXXX.

Finally, Defendant will not be immediately eligible to apply for U.S. citizenship if granted cancellation of removal. In order to be eligible to naturalize, a permanent resident must establish good moral character for at least five years preceding the application. 8 U.S.C. §1427(e). Practically speaking, that means an applicant must not be arrested or convicted of an offense for at least five years before applying for naturalization. Even after that five-year period, U.S. Citizenship & Immigration Services (“USCIS”) will not grant a naturalization application until the applicant’s probation has been completed. 8 C.F.R. §316.10(c)(1).

### **SENTENCING RECOMMENDATION**

Because a one-year or longer sentence on any of the burglary counts or the theft count will trigger the harshest of immigration consequences, I am recommending that Defendant seek a sentence that will at least give him an opportunity to ask for discretionary relief in immigration court.

Avoiding the aggravated felony designation can be achieved in two ways. First, Defendant can be sentenced to consecutive jail terms as long as he is not sentenced to one year or more on any single count of burglary or theft. For example, Defendant can be sentenced to consecutive six-month jail terms for two burglary counts and lengthy probation ordered with respect to the other counts.

Alternatively, Defendant can be sentenced to jail time on the possession of narcotics offense. Unlike burglary or theft, a sentence of one year or more on the possession of heroin conviction will not trigger the aggravated felony definition. That conviction is a deportable offense regardless if the jail term is one day or one year.

In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that a defense attorney owes a Sixth Amendment duty to inform his client of the immigration consequences of a plea or charge. At the end of the majority decision, the Court stressed that “informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process.” *Id.* at 1486. The Court further stated it is appropriate for the parties to “craft a conviction **and sentence** that reduce[s] the likelihood of deportation, **as by avoiding a conviction for an offense that automatically triggers the removal consequence.**” *Id.* (emphasis added).

In light of the Supreme Court’s statements in *Padilla*, I believe that Defendant’s ability to seek discretionary relief in deportation proceedings is an important and appropriate factor during his sentencing. He can only seek cancellation of removal if he avoids a one-year or longer sentence on any of the burglary or theft counts.

Criminal Defense Attorney

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If you, the district attorney, or the sentencing court has any questions regarding my analysis and recommendations, I would be happy to appear telephonically at the sentencing hearing.

Sincerely,

Davorin J. Odrcic

Encl.