

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

-vs-

No. 2017-12345-FC
Hon. Buford T. Justice

IVAN IMMIGRANT,

Defendant.

WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff
1441 St Antoine
Detroit, MI 48226
(313) 224-5777

CLARENCE DARROW (P77777)
Attorney for Defendant
350 Fort Street, #123
Detroit, MI 48226
(313) 555-1212

**MOTION TO AUTHORIZE PAYMENT OF FEES TO IMMIGRATION
ATTORNEY FOR OPINION ON DEFENDANT'S IMMIGRATION CONSEQUENCES
OF PROPOSED PLEA**

(With Incorporated Brief in Support)

NOW COMES the Defendant, IVAN IMMIGRANT, by and through his attorney
CLARENCE DARROW, and asks this Court to approve the payment of \$400 for an
immigration opinion based on the following:

1. Defendant is currently charged with possession of cocaine, contrary to MCL 333.7403

2. The State has alleged that the Defendant sold an undercover officer five grams of cocaine.

3. Defendant has pled not guilty to these charges.

4. Mr. Immigrant is a citizen of Kosovo, married to an American citizen, and has an American citizen child with special needs. He has permanent residency in the US and was eligible to apply for naturalization as a citizen on March 2 2018.

5. The State has offered the Defendant a plea under MCL 333.7411 which would result in no criminal conviction for most purposes.

6. Counsel is concerned that this conviction would result in the Defendant's removal from the US.

7. While counsel is relatively confident that the proposed plea cannot be accepted because of the immigration issue, counsel cannot effectively negotiate with the Government with knowledge of what pleas can save the Defendant from removal. The People have indicated there was some flexibility on the part concerning the disposition in this matter.

8. Further complicating this matter is the fact that the "involved in drug trafficking" bar does not require a formal conviction. This means that the Defendant's disclosures and admissions need to be managed in order to effectuate a settlement.

9. Incorrect advice by the undersigned about immigration consequences can render the undersigned ineffective.¹ The United States Supreme Court has said that counsel has a duty to advise the Defendant concerning immigration consequences of a plea. In *Padilla* the Court specifically stated that simply informing the Defendant that there may be immigration consequences of the plea is not good enough. Similarly, telling a Defendant that a plea to an offense *will* result in the Defendant's deportation when counsel is not sure will not help. The United States Supreme Court has allowed Defendant's to argue that counsel was ineffective in giving the Defendant defective advice which causes them to reject a plea.

10. Complicating the instant matter is the fact that there is an immigration classification which allows an individual to be removed for drug trafficking. Drug trafficking does not require a conviction and a person can be

¹ *Boyd v Waymart*, 579 F3d 330, 349 (CA 3 2009) (“Ineffective assistance of counsel during plea negotiations can invalidate a guilty plea and make granting withdrawal appropriate, to the extent that the counsel’s deficient performance undermines the voluntary and intelligent nature of defendant’s decision to plead guilty.”) (quoting *United States v Arteca*, 411 F3d 315, 320 (CA 2 2005)); *United States v Couto*, 311 F3d 179, 191 (CA 2 2002), *Padilla v Kentucky*, 559 US 356; 130 S Ct 1473; 176 L Ed 2d 284 (2010) (holding that plea was rendered “involuntary” by counsel’s ineffective assistance in affirmatively misrepresenting immigration consequences); *Hammond v United States*, 528 F2d 15, 18 (CA 4 1975) (“If counsel was ineffective, it follows that Hammond’s pleas were involuntary. The Brady trilogy . . . makes it perfectly plain that the sine qua non to a voluntary plea of guilty is the assistance of counsel within the range of competence required of attorneys representing defendants in criminal cases.”); *People v Correa*, 108 Ill 2d 541; 485 NE2d 307 (1985) (“If the defendant’s pleas were made in reasonable reliance upon the advice or representation of his attorney, which advice or representation demonstrated incompetence, then it can be said that the defendant’s pleas were not voluntary”).

removed if there are reasonable grounds where the immigration authorities believe that the person is removable.²

11. The California Court of Appeals has held that failing to defend against immigration consequences, and not simply failing to advise of them, can constitute ineffective assistance.³ Further, incomplete or inadequate advice can run afoul of *Padilla*. For example, telling a Defendant that a plea *may* have immigration consequences when deportation is mandatory could erroneously imply that the Defendant would have the ability to make an equitable argument to the immigration authorities why he or she should be allowed to stay. Telling a Defendant that an offense is not removable when in fact the Defendant is not admissible might cause the Defendant to take a trip home to visit relatives and become barred from the United States. Immigration advice simply can't be casually be dispensed.

12. Mr. Immigrant would like to settle this case and return to caring for his family but understandably will not tender a plea and give up what he believes is a valid defense on the hope that he can avoid removal from his family and friends.

² See *McMann v Richardson*, 397 US 759, 771; 90 S Ct 1441; 25 L Ed 2d 763 (1970) (holding that defendants are entitled to “effective assistance of competent counsel” whose advice is “within the range of competence demanded of attorneys in criminal cases,” and noting that “[i]t has long been recognized that the right to counsel is the right to effective assistance of counsel”); see also *United States v Cronin*, 466 US 648, 653–57; 104 S Ct 2039; 80 L Ed 2d 657 (1984) (describing the substance and purpose of the Constitution’s guarantee of effective assistance of counsel); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (elaborating a two-part test for effective assistance of counsel).

³ *People v Bautista*, 115 Cal App 4th 229; 8 Cal Rptr 3d 862 (2004), as mod (Feb. 17, 2004).

Simply telling the Defendant that there “may be immigration consequences and I am not competent to advise you on the same is grossly inadequate.”

13. Attorney Louis Lawyer has agreed to provide an immigration opinion for \$400. His vita is attached. He is a member of the American Immigration Lawyer’s Association, a practicing criminal defense lawyer, and can provide the opinion before the next pretrial conference in this matter.

14. Both due process and Michigan statutory law favor the appointment of this expert in this case.⁴ “[F]undamental fairness requires that the state not deny [defendants] an adequate opportunity to present their claims fairly within the adversary system.”⁵

⁴ MCL 775.15; US CONST amend. VI; MI CONST Art. 1, § 20 (1963); *Ake v Oklahoma*, 470 US 68, 84; 105 S Ct 1087; 84 L Ed 2d 53 (1985) ; *People v Steele*, 283 Mich App 472, 480; 769 NW2d 256 (2009);” *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997).

⁵ *Leonard*, 224 Mich App 569 (quotation marks and citations omitted).

WHEREFORE, Defendant prays this Court appoint Attorney Louis Lawyer as a consulting expert witness in this case to render an opinion about the proposed plea and immigration strategies that can accommodate the needs of the People and the defense in this matter.

Respectfully submitted,

/s/Clarence Darrow

CLARENCE DARROW (P77777)
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DATED: September 4, 2017

CERTIFICATE OF SERVICE

A copy of this Motion (with attachments) was this day served on the Wayne County Prosecutor's Office through the Court's Odyssey E-Filing System.

Respectfully submitted,

/s/Clarence Darrow

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DATED: September 4, 2017