IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel.	)	
	)	
Mahir MOHAMMAD,	)	
	)	
Petitioner/Relator,	)	No. SC87012
	)	
v.	)	
	)	
Hon. Joan L. Moriarty,	)	
	)	
Respondent.	)	

PETITIONER/RELATOR'S BRIEF

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TABLE OF AUTHORITY

State Cases:

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Jurisdiction

This action is one involving the question of whether the trial court erred in refusing to permit Relator, charged with possession of a controlled substance, a class C felony under RSMo Sec. 195.202, to withdraw his guilty plea because he was misinformed by his defense counsel of the direct and dire immigration consequences of such a plea, rendering his said plea in effect involuntary and such poor counsel tantamount to ineffective assistance of counsel, and whether, pursuant to Rule 29.07(d), the plea of guilty in this case should be set aside to correct a manifest injustice.

Facts

1. Petitioner is a 39-year-old Lawful Permanent Resident ("LPR"), of Afghani nationality, who has continuously resided in the United States for almost ten (10) years.

2. In April of 2002, Petitioner was charged with attempting to buy a controlled substance, i.e. 0.15 grams of cocaine.

3. On or about November 15, 2002, on advice of his then criminal defense counsel, Petitioner entered a guilty plea to the charge of a Class C felony in the City of St. Louis, Cause 011-4089.

4. As a result of his guilty plea, Petitioner received a suspended sentence imposition of sentence and five (5) years probation on the same date.

5. Based on his guilty plea and the sentence imposed, Immigration and Customs Enforcement (ICE) initiated removal proceedings against Petitioner.

6. On March 10, 2003, an Immigration Judge ordered Petitioner removed from the United States to Afghanistan.

7. The sole basis for removing Petitioner was his November 15, 2002 guilty plea to the Class C felony.

8. On March 10, 2003, Petitioner timely filed his motion to withdraw his guilty plea, due to ineffective assistance of counsel, and requested a trial on the merits before the Circuit Court in the City of St. Louis.

9. The Circuit Court in the City of St. Louis denied Petitioner's motion to withdraw his guilty plea as well as his motion to reconsider.

10. On September 4, 2003, upon the denial of Petitioner's said motion, Petitioner timely filed an appeal with the Missouri Court of Appeals for the Eastern District of Missouri.

11. On April 6, 2004, the Court of Appeals dismissed Petitioner's appeal without prejudice for lack of a final, appealable judgment.

12. The Court of Appeals pointed out that the appropriate remedy for seeking review of the denial of a motion to withdraw a guilty plea when the imposition of sentence is suspended is by a writ of mandamus. *State v. Larson*, 79 S.W.3d 891, 894 (Mo. banc 2002).

13. On June 24, 2005, Petitioner filed his Writ of Mandamus with the Missouri Court of Appeals for the Eastern District of Missouri, which was summarily denied on July 5, 2005.

Point Relied On

The trial court erred in refusing to permit Relator to withdraw his guilty plea because he was misinformed by his defense counsel of the direct and dire immigration consequences of such a plea, rendering his said plea in effect involuntary and such poor counsel tantamount to ineffective assistance of counsel and, pursuant to Rule 29.07(d) and the principles of fundamental fairness, the plea of guilty in this case should be set aside to correct a manifest injustice.

State v. Florian Brown, St. Louis County Cause No. O1CR-5970B, Circuit Judge John A. Ross, on October 7, 2003.

INS v. St. Cyr, 533 U.S. 89, 323 n. 50, 121 S.Ct. 2271 (2001).

U.S. v. Couto, 311 F.3d 179 (2nd Cir. 2002).

Bridges v. Wixon, 326 U.S. 135, 89 L.Ed. 2103, 65 S.Ct. 1443 (1945).

Writ of Mandamus

1. As Respondent states, "Such relief [permitting a defendant to withdraw a guilty plea prior to sentencing] is reserved only for extraordinary circumstances that indicate manifest injustice, and these extraordinary

circumstances include involuntariness, fraud, fear, and the holding out of false hopes." *State v. Taylor*, 929 S.W.2d 209, 215 (Mo.banc 1996).

2. Mandamus is a remedy designed to enforce a right or claim. *State ex rel. Commissioners of the State Tax Commission v. Schneider*, 609 S.W.2d 149, 151 (Mo.banc. 1980).

3. Mandamus will lie where there is "an existing, clear, unconditional, legal right in relator and a corresponding present, imperative, unconditional duty upon the part of the respondent." *State ex rel. Sayad v. Zych*, 642 S.W.2d 907, 911 (Mo.banc 1982).

4. A writ of mandamus should be issued in this case because: (1) there was "an existing, clear, unconditional legal right in relator," namely, Petitioner's Constitutional right to effective assistance of counsel pursuant to the Sixth Amendment of the United States Constitution; (2) Respondent, as an Associate Judge in the Circuit Court for the City of St. Louis, had "a corresponding present, imperative, unconditional duty" to ensure that Petitioner's Constitutional right was protected; and (3) the only way for Respondent to discharge its duty and to protect Petitioner's Constitutional right is to allow Petitioner to withdraw his guilty plea.

5. As a criminal defendant, Petitioner is afforded by the Sixth Amendment of the United States Constitution the right to assistance of counsel.

6. When entering his guilty plea, Petitioner, however, did not receive **effective** assistance of counsel.

7. The function of a writ of mandamus is to enforce, not establish, a claim or right and its purpose is to execute, not adjudicate. *Naugher v. Mallory*, 631 S.W.2d 370 (App. W.D. 1982).

8. A writ of mandamus is an extremely powerful judicial tool, one reserved for extraordinary emergencies.

9. Mandamus is to be issued only when the right to be enforced is clear and there is no other adequate remedy.

10. In mandamus, the relators must stand upon the existence of a clear unequivocal, specific right to enforce an act required by law, and the court may not coerce the performance of an unlawful act. *State ex rel. Priest v. Gunn*, 326 S.W.2d 314 (Sup. 1959).

11. Mandamus will not lie to control the exercise of a discretionary power, but will issue to command the performance of duties when the discretionary power is exercised with manifest injustice. *State ex rel. Kugler v. Tillatson*, 304 S.W.2d 485 (App. 1957), transferred to 312 S.W.2d 753.

12. In our case, a writ of mandamus is appropriate as Petitioner was not permitted his Sixth Amendment Constitutional right to **effective assistance of**

counsel when he was grossly misinformed of the immigration consequences by his ineffective counsel.

13. More importantly, if Relator's writ of mandamus is granted, and he is permitted to withdraw his guilty plea, the Immigration and Naturalization Service and the Immigration Court will have no basis in which to order Relator be removed from this country.

14. Courts in St. Louis County have already begun to realize the serious consequences for non-U.S. citizen criminal defendants caused by their criminal defense attorneys' lack of knowledge regarding immigration laws, and have begun to remedy these attorneys' ineffective assistance by allowing non-U.S. citizens to withdraw their guilty pleas.

15. In a similar case, *State of Missouri v. Florian Brown*, St. Louis County Cause No. O1CR-5970B, Circuit Judge John A. Ross, on October 7, 2003, set aside a defendant's guilty plea finding, "that principles of fundamental fairness dictate that the plea of guilty in this case be set aside" (Appendix p. A-1)

16. Our case is identical to *Brown* in that Defendant asked his attorney how his plea of guilty would affect his immigration status and was told that it would not affect it at all.

17. Brown pled guilty to "acting together to manufacture and sell a controlled substance."

18. However, USCIS viewed Brown as a convicted aggravated felon due to his guilty plea and his suspended imposition of sentence.

19. Since the St. Louis County Courts allowed the defendant Brown to withdraw his guilty plea, this honorable Court should direct the Circuit Court of the City of St. Louis to allow Relator to withdraw his guilty plea as well.

Ineffective Assistance of Counsel

1. It is most unfortunate that Respondent does not believe manifest injustice would result from the acceptance of Relator's guilty plea and if he is ***not*** permitted to withdrawal said plea, as Relator believes not being afforded his Sixth Amendment Constitutional right to assistance of counsel *is* manifest injustice.

2. Furthermore, due to Relator's ineffective assistance of counsel, he will be deported from the U.S. to Afghanistan and forced to leave his wife and three children, the youngest of whom is a U.S. Citizen, which would cause them severe hardship, possibly placing them on welfare, since he is the sole provider for his family, or, if Relator is permanently removed from this country, Relator's family will also suffer extreme hardship if they are forced to follow him to Afghanistan (because they love him and because he is the sole provider for the family) which in total is manifest injustice.

3. Manifest injustice occurs because Relator specifically and purposely informed his criminal defense attorney, Mr. Brad Emert, of his immigrant status;

Mr. Emert was conscious of Relator's specific concerns about his immigration status at all time; Mr. Emert allegedly discussed Relator's concerns with an immigration attorney; however, Mr. Emert deliberately misled Relator by not informing him that pleading guilty to a Class C felony would greatly and adversely affect his immigrant status.

4. Furthermore, if counsel affirmatively gives a criminal client erroneous advice, "the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 1449 (1970)," and whether or not the Petitioner was prejudiced. *Hill v. Lockhart*, 474 U.S. at 56, 106 S.Ct. at 369.

5. In *Redeemer v. State*, 979 S.W.2d 565, 572 (Mo. App. W.D. 1998), the Missouri Court of Appeal stated that:

> "When a Petitioner inquires of his trial counsel concerning a collateral consequence, counsel misinforms his or her regarding that consequence, and the Petitioner relies upon the misrepresentation in deciding to plead guilty, then counsel's action may rise to the level of constitutionally ineffective assistance of counsel."

6. Moreover, recent Supreme Court authority supports a broader view of attorney responsibility as well. See, e.g., *INS v. St. Cyr*, 533 U.S. 89, 323 n. 50, 121 S.Ct. 2271 (2001). ("Even if the Petitioner was not initially aware of [possible waiver of deportation under the Immigration and Nationality Act's prior] §212(c), *competent defense counsel*, following the advice of numerous practice guides, would have advised him concerning the provision's importance." (Emphasis added.) (citing Amicus Br. For Nat'l Assoc. Criminal Defense Lawyers et al. at 6-8)); *id*. at 322 n. 48, 121 S.Ct. 2271 (noting that "the American Bar Association's Standards for Criminal Justice provide that, if a Petitioner will face deportation as a result of a conviction, defense counsel 'should fully advise the Petitioner of these consequences'" (citing ABA Standards for Criminal Justice, 14-3.2 Comment, 75 (2d ed.1982))).

7. California Penal Section 1016.5, states that:

> "(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the Petitioner:
>
> If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences

> of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.
>
> (b) Upon request, the court shall allow the Petitioner additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, after January 1, 1978, the court fails to advise the Petitioner as required by this section and the Petitioner shows that conviction of the offense to which Petitioner pleaded guilty or nolo contendere may have the consequences for the Petitioner of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on Petitioner's motion, shall vacate the judgment and permit the Petitioner to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty.

8. In *U.S. v. Couto*, 311 F.3d 179 (2nd Cir. 2002), an alien convicted of an aggravated felony was permitted to withdraw her plea of guilty on the ground of ineffective assistance of counsel because of her attorney's affirmative misrepresentation about the deportation consequences of her guilty plea fell below an objective standard of reasonableness.

9. The Court further held that Ms. Couto's overriding concern in remaining in the U.S. rendered it very unlikely that she would have pleaded guilty

if she had understood the deportation consequences of that plea; hence, her plea was rendered involuntary by her counsel's ineffective assistance.

10. As Respondent's cite in its response to our writ of mandamus before this Court that, "the 8th Circuit had previously held that a state-level possession was an aggravated felony in *U.S. v. Briones-Mata*, 116 F.3d 308, 309-310 (8th Cir. 1997)."

11. Thus, as is evidenced by *U.S. v. Briones-Mata*, an effective assistance of counsel would have known that Relator would have been deportable if he pled guilty to a state drug charge.

Involuntary Plea

1. At Petitioner's trial and hearings, there was never a discussion, by the judge or his defense counsel, of his immigration status or the immigration consequences of his pleading guilty to a felony. (Appendix pgs. A-2 through A-17.)

2. Relator's plea of guilty was **not** voluntary because if Relator, or any *reasonably prudent person*, knew or would have known that his plea of guilty would result in him being deported from the U.S., Relator would ***never*** have pled guilty.

3. On April 26, 2002, the Court did question Relator, and the following excerpt is from his transcript, to-wit:

a. Court: "Are you satisfied that your attorney has sufficient information and facts to adequately represent you and advise you in this case?"

b. Relator through the interpreter: "Yes."

c. Court: "Have you been advised by Mr. Emert as to all aspects of this case, including your legal rights?"

d. Relator through the interpreter: "Yes."

e. Court: "Are you satisfied with the services rendered to you by Mr. Emert?"

f. Relator through the interpreter: "Yes."

(Appendix p. A-10.)

4. However, Relator believed that when the Court asked him if he was satisfied with his defense counsel's services, that his immigration status was not an issue here as he had already consulted his attorney on this matter.

5. Although the Court asked Relator if he understood the range of punishment and Relator said "yes," Relator did not think said range of punishment would have any effect on his immigration status, since he had already discussed this issue with his attorney, and since the Court did not mention anything about him being deported.

6. At the time Relator stated that he was satisfied with Mr. Emert's services, Relator was satisfied since he believed Mr. Emert knew what he was doing, was a competent attorney, and had addressed all of his concerns; kept him out of jail and obtained a suspended imposition of sentence, which if he successfully completed his period of probation, the charges would be expunged from his record.

7. Relator trusted his attorney and believed that his attorney knew what was best for him under these circumstances.

8. It was ***not*** until he was thrown into deportation proceedings and consulted a real immigration attorney, did he realize that Mr. Emert should **never** have had him plead guilty and that only because of this plea was he going to be deported back to Afghanistan.

9. Relator could not have informed the Court that he was misled or misinformed by his counsel *at the time of his plea* as he was totally unaware of the gravity of Mr. Emert's error.

10. An attorney does have an obligation to inform Relator of the consequences of a guilty plea, especially *when Relator specifically and purposely informs his defense attorney of his immigrant status.*

11. Both the circuit court and his defense counsel knew or should have known at the hearing that Relator was a recent immigrant to this country as he did

so state to the court at his April 26, 2002 hearing, when he testified, through an interpreter, that, "(Interpreting.) I have been in America for something like eight months. Since August, 2001." (Appendix p. A-9.)

12. Furthermore, Relator testified that he was born on January 3, 1964, making him an 38-year old adult at the time, and when the judge inquired if he could read and write English, his answer, through an interpreter, was "No." (Appendix p. A-9.)

13. Not to address such concern is tantamount to legal malpractice.

14. Unlike *State v. Hasnan*, 806 S.W.2d 54 (Mo.App.W.D. 1991), Relator did not rely on the *Court* to advise him of the possibility of deportation; however, he did rely on his *attorney*, Mr. Emert, to advise him of said possibility.

15. Relator is uncertain why Respondent states that Relator did not inform the Court that he was misled or misinformed by his counsel when in fact that is the very basis of Relator's Motion to Withdraw Plea.

16. Furthermore, Relator has ***never*** "changed his argument to allege that plea counsel did not merely fail to advise, but rather incorrectly advised Relator of possible deportation consequences."

17. As Relator stated in paragraphs 6 and 7 of his Motion to Withdraw Plea, "Defendant did inform his attorney of his immigration status. Defendant's defense counsel did discuss this problem with an immigration attorney, but did not

inform Defendant that pleading guilty to a Class C felony would adversely affect his immigration status."

18. Furthermore, in paragraphs 12 B and C of his said motion, Defendant states, "B. Defendant's ineffective defense counsel did not inform him of the adverse affect to his immigrant status if he pled guilty to a Class C felony and erroneously advised him to plea guilty; C. But for defense counsel's deficiency, Defendant was sorely misinformed by said counsel of the immigration impact of pleading guilty to the charge of a Class C felony."

19. Also, in paragraph 13, Defendant states, "Defendant took the ill advice of his ineffective counsel causing him serious detriment, i.e. Defendant is in the process of being deported from this country."

20. Relator expressly informed Mr. Emert of his immigration status and when Mr. Emert did not inform him of any consequences; Relator believed his plea of guilty would not cause any adverse consequence to his immigration status.

21. Respondent's argument that Mr. Emert's advice was not erroneous at the time of the plea is completely wrong.

22. Respondent's *assumption* that a state-level possession of controlled substance conviction was an offense that would not result in certain deportation at the time of the plea on April 25, 2002, is also completely ***erroneous***.

23. Furthermore, Respondent's assumption that the Board of Immigration Appeals (hereinafter referred to as "BIA") is the deporting agency is just plain wrong.

24. The BIA is the highest administrative body for interpreting and applying our immigration laws. It does not make laws, but rather hears appeals from decisions rendered by Immigration Judges and District Directors of the Department of Homeland Security, and can be overruled by the Attorney General or a Federal court.

25. Immigration and Custom's Enforcement (ICE) is the deporting agency and the BIA is the appellate tribunal.

26. ICE has been deporting aliens for state-level possession of controlled substance conviction since 1986, when Congress passed the Anti-Drug Abuse Act of 1986, Pub.L. 99-570, Sec. 1751(b), 100 Stat. 3207 (Oct. 27, 1986), which amended then INA Sec. 241(a)(11) to refer to aliens who had been convicted of violating "any law or regulation … *relating to a controlled substance* (as defined in 21 U.S.C. Sec. 802)." With some subsequent additional modifications, we now have what is known as INA Section 237(a)(2)(B), which basically holds that an alien is removable from this country if he is convicted of violating a state of federal law relating to a controlled substance other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

27. In 1988, growing concerns about drug abuse led Congress to add a new deportation ground that would expand well beyond the drug context. The Anti-Drug Abuse Act of 1988, Pub.L. 100-690, Sec. 7341, 7344, 102 Stat. 4181, 4469-71 (Nov. 18, 1988), created a new concept called “aggravated felony” and rendered deportable any alien who (after entry) had been convicted of one, which is now embodied in Immigration and Nationality Act (INA) Section 237(a)(2)(A)(iii).

28. As further evidence that ICE has been deporting aliens for state-level possession of controlled substance convictions, Relator directs this Court’s attention to *In re Yanez-Garcia*, 23 I & N Dec. 390, 396-397 (BIA 2002), which is the very same case that Respondent relies on.

29. Said case began when Mr. Yanez-Garcia was “convicted twice in the Circuit Court of Cook County, Illinois, of the offense of possession of cocaine in violation of Chapter 720, Section 570/402(c) of the Illinois Compiled Statutes: (1) on January 5, 1998, for which he was fined and sentenced to 1 year of probation; and (2) on May 27, 1999, for which he was sentenced to 90 days of incarceration and 18 months of probation. His offenses were classified as "class 4 felonies" under Illinois law, and are therefore punishable by a term of imprisonment of between 1 and 3 years. See 730 Ill. Comp. Stat. Ann. 5/5-8-1(a)(7) (West 1999). On the basis of these convictions, the Immigration and Naturalization Service

charged that the respondent was removable as an alien convicted of an aggravated felony under section 237(a)(2)(A)(iii) of the Act, 8 U.S.C. § 1227(a)(2)(A)(iii) (2000), and as an alien convicted of an offense relating to a controlled substance under section 237(a)(2)(B)(i) of the Act. The Immigration Judge sustained both charges, and this timely appeal followed."

30. The BIA affirmed ICE and the Immigration Judge's decision to deport Yanez-Garcia. In other words, an Immigration Judge found that Mr. Yanez-Garcia was removable from this country in its decision dated March 14, 2000, and the alien appealed this decision to the BIA, which merely affirmed the. Immigration Judge's order in its decision decided on May 13, 2002.

31. In other words, no new law was made on May 13, 2002, which changed or affected Relator's immigration rights.

32. Furthermore, said case discussed its precedent decision in *Matter of K-V-D-*, Interim Decision 3422 (BIA 1999), where the BIA held that state drug offenses may be considered aggravated felonies for immigration law purposes only if they are "analogous" to offenses punishable as felonies under the federal drug laws.

33. Respondent also cite in its said response the case of *State v. Clark*, 926 S.W.2d 22 (Mo.App. W.D. 1996), where a defendant pled guilty in **1992** to

possession of a controlled substance and sought to withdraw his guilty plea after the commencement of deportation proceedings.

34. Although the BIA did not decide *In re Yanez-Garcia* until May 13, 2002, ICE has been deporting aliens for state-level possession convictions since 1988.

35. *In re Yanez-Garcia* is significant because it clarified whether a state drug offense constitutes a "drug trafficking crime" such that it may be considered an "aggravated felony" for purposes of removing alien offenders from this country.

36. In our case, Relator plead guilty on April 26, 2002, and removal proceedings were commenced under the same two sections of the Immigration and Nationality Act as in the *Yanez-Garcia* case, i.e. Sections 237(a)(2)(A)(iii) and 237(a)(2)(B)(i) of the INA.

37. Relator's Notice of Action, the charging document that begins removal proceedings, states that under Section 237(a)(2)(A)(iii) of the INA, as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in Section 101(a)(43)(B) of the INA, an offense relating to the illicit trafficking in a controlled substance, as described in Section 102 of the Controlled Substances Act, including a drug trafficking crime, as defined in Section 924(c) of Title 18, United States Code. (See Appendix p. A-19.)

38. Furthermore, Relator is being deported under Section 237(a)(2)(B)(i) of the INA, as amended, in that, at any time after admission, you have been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), other than a single offense involving possession for one's own use of 30 grams or less of marijuana.

39. Thus regardless of *In re Yanez-Garcia*, Relator is also being removed by ICE for possession of a controlled substance under Section 237(a)(2)(B)(i) of the INA.

40. Petitioner is able to prove, by clear and convincing evidence, that he entered his guilty plea ***involuntarily*** because he was grossly misinformed by his criminal defense attorney of the dire consequences of such a plea, which clearly amounts to ineffective assistance of counsel. *State v. Abernathy*, 764 S.W.2d 514 (Mo.App. 1989).

a. In *Strickland v. Washington*, 466 U.S. 668 (1984), an ineffective assistance claimant must show:

i. Deficient performance by counsel; and that

ii. But for such deficiency, the result of the proceeding would have been different.

b. Petitioner's criminal defense attorney provided ineffective assistance of counsel in that:

i. An effective counsel would have or should have known of the dire consequences an LPR would suffer if he pled guilty to a Class C felony, and would never have allowed him to do so;

ii. Petitioner specifically and purposely informed his criminal defense attorney of his immigrant status;

iii. The attorney was conscious of Petitioner's specific concerns about his immigration status at all time;

iv. The attorney allegedly discussed Petitioner's concerns with an immigration attorney;

v. However, the attorney deliberately misled Petitioner by choosing not to inform him that pleading guilty to a Class C felony would greatly and adversely affect his immigrant status;

vi. Furthermore, the attorney erroneously advised Petitioner to plead guilty in order to obtain a suspended imposition of sentence (SIS), which would have been expunged from his record if Petitioner successfully completed his period of

probation, despite its serious consequences to Petitioner's immigration status;

vii. Obviously, Petitioner's attorney did not know that U.S. Citizenship and Immigration Services (USCIS) views an SIS as a "conviction" for immigration purposes, which in turns classifies Petitioner as an "aggravated felon," causing ICE to immediately instigate removal proceedings against him;

viii. Petitioner's defense attorney clearly did not know that the immigration laws define the word "conviction," for purposes of deportation as, "any judicial adjudication of guilty coupled with some form of restraint on the person's liberty, such as a suspended imposition of sentence plus probation";

ix. An effective counsel would have informed Petitioner of the dire immigration consequences of a "felony conviction" (as defined by 8 U.S.C. Sec. 1101(a)(48));

x. Defense counsel was unaware of the fact that immigration law has its own standards and definitions, which differ from Missouri law; and

xi. As Petitioner did not have any prior felony convictions, the attorney should have negotiated the change down to a

misdemeanor and/or had Petitioner pay a greater fine to avoid a "felony conviction" for immigration purposes.

c. But for Petitioner's criminal defense attorney's recommendation to plead guilty, the results of this proceeding would have been vastly different in that:

i. Petitioner was under the impression that his immigration concerns had been addressed when the attorney advised him to plead guilty since he had specifically conveyed his immigration concerns to counsel;

ii. It was based solely on the defense attorney's advice when Petitioner decided to enter a guilty plea; and

iii. If Petitioner would have been informed of the dire consequences to his immigration status that such a guilty plea would have caused, Petitioner would never have entered such a plea and the results of the proceeding would definitely have been vastly different.

d. Furthermore, the totality of the circumstance, which should be evaluated by the Court, as mandated by *Downs-Morgan v. United States*, 765 F.2d 1534, 1537-38 (11th Cir.1985), is extremely critical to Petitioner's case, in that:

i. Although Petitioner has been sentenced to five (5) years probation, he will not be able to complete his period of probation if he is removed from this country;

ii. Furthermore, USCIS will not allow him back into this country until he successfully completes his probation;

iii. Therefore, Petitioner is now in a "Catch-22" situation and, if removed, will never be allowed to return to the U.S. to be with his wife and three children;

iv. Petitioner was also deprived of his Sixth Amendment Constitutional right to **effective assistance of counsel**;

v. If deported, Petitioner would be forced to leave his wife and three children, the youngest of whom is a U.S. Citizen, which would cause them severe hardship, possibly placing them on welfare, since he is the sole provider for his family;

vi. Furthermore, if Petitioner is permanently removed from this country, Petitioner's family will also suffer extreme hardship if they are forced to follow him to Afghanistan (because they love him and because he is the sole provider for the family);

vii. Deportation is unusually cruel for Petitioner as Petitioner may also be permanently barred from re-entering the United States;

viii. Petitioner has always been, and still is, gainfully employed here in the St. Louis area on a full-time basis;

ix. Petitioner comes from a good home, has no extensive criminal record, and continues to provide for and support his family;

x. Petitioner is not a flight risk or a danger to the public; and

xi. All the charges that make Petitioner deportable are solely grounded on this single guilty plea.

Direct Consequence

1. In *Bridges v. Wixon*, 326 U.S. 135, 89 L.Ed. 2103, 65 S.Ct. 1443 (1945), the United States Supreme Court held that, "although deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling" and, most significantly, that, **"deportation may result in the loss of all that makes life worth living."** *Id*. (Emphasis added.)

2. More importantly, *U.S. v. Couto* stated that as an alien convicted of an aggregated felony is automatically subject to removal and no one - not the judge, the USCIS, nor even the United States Attorney General - has any discretion to stop the deportation.

3. In other words, as deportation is really a direct consequence, because it is automatic and an unavoidable consequence of an alien's conviction for an aggravated felony, it should **not** be treated as a collateral consequence anymore.

4. More importantly, if Petitioner's writ is granted, and he is permitted to withdraw his guilty plea, the Immigration and Naturalization Service and the Immigration Court will have no basis in which to order Petitioner be removed from this country.

5. If deported, Petitioner would be deprived of his right to prove his innocence in a trial on the merits of his case, should his guilty plea be permitted to be withdrawn and a request for trial on the merits be granted.

Conclusion

1. Petitioner has shown that he has a clear, unconditional, unequivocal, specific, and positive legal right to have said writ executed, and that the Court has an imperative duty to execute said writ.

2. With equitable principles taken into consideration on the above-mentioned consequences to Relator, the propriety of granting said writ is overwhelming.

WHEREFORE, Relator, for all of the above reasons, prays that this honorable Court order the Circuit Court of the City of St. Louis to allow Relator to withdraw his plea of guilty.

Certificate of Service

A copy of the foregoing was mailed by first class mail, postage prepaid, on this 30th day of October, 2005, to:

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Edgar E. Lim

Certificate of Compliance

I do hereby certify that the above brief complies with the limitations contained in Rule 84.06(b), has only 10,000 words in it, and the attached floppy disk has been scanned for viruses and that it is virus-free, on this 30th day of October, 2005, to:

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Respondent.	)	

APPENDIX

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