

NOTE: This sample document contains a wholly fabricated scenario and is only to be used as a reference point *prior to* conducting your own independent legal research and factual investigation. The footnotes in this sample document are intended to be included as integral parts of the affidavit. The endnotes provide additional information and practice tips to help users of this sample document.

SUPREME COURT: STATE OF NEW YORK
COUNTY OF NEW YORK: PART __

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

AFFIRMATION IN
SUPPORT OF MOTION
DCKT. NO. _____

CLIENT

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LAWYER, ESQ., an attorney duly admitted to practice law in the State of New York, affirms under penalty of perjury that:

1. I am the attorney of record for MR. CLIENT. I am familiar with the facts of this case and make this affirmation in support of defendant's motion herein.
2. Unless otherwise specified, all allegations made in this affirmation are made upon information and belief based upon my discussions with Client and with Mr. Prior Lawyer, and the papers and proceedings related to the underlying criminal charges.

**MOTION TO VACATE CONVICTION FOR
ATTEMPTED POSSESSION OF CONTROLLED SUBSTANCE**

3. Mr. Client was born in the Dominican Republic and entered the United States in December 2002, when he was seventeen years old, as a lawful permanent resident ("green card holder"). He has not visited the Dominican Republic since his departure. He was a lawful permanent resident when he entered the guilty plea at issue in March 2009.

4. Mr. Client's parents, brother and sister live in New York City; he has no family ties in the Dominican Republic, with the exception of one aunt that he has not seen since he left. Until his detention in 2013 by Immigration and Customs Enforcement (ICE), Mr. Client was living with his wife and two children, all of whom are U.S. citizens, in an apartment in the Bronx.
5. Until his detention in 2013 by ICE, Mr. Client worked full-time as a manager of Calabrese's Auto Repair Shop, where he had been employed for nine years.
6. Mr. Prior Lawyer represented Mr. Client in Dckt. No. _____, which was originally filed as criminal possession of a controlled substance in the seventh degree (N.Y. Penal Law § 220.03).
7. On January 5, 2009, Mr. Client was stopped while driving home from a party at his boss' house in Tarrytown, with his brother-in-law. The police officer claimed that he stopped Mr. Client because he failed to come to a complete stop at a stop sign before proceeding through the intersection.
8. Mr. Client was driving his brother-in-law's car as the "designated driver" for the evening.
9. As Mr. Client reached into the glove compartment for the registration and proof of insurance, a baggie containing a small amount of cocaine fell out of the glove compartment.
10. Mr. Client was charged with criminal possession of a controlled substance in the seventh degree.
11. This was the first time Mr. Client had ever been arrested or charged with a crime, or even a violation, aside from two speeding tickets; he has had no arrests or charges since this incident.

12. Mr. Client was arraigned on March 25, 2009, at which time Mr. Prior Lawyer was assigned to the case.
13. Mr. Prior Lawyer met with Mr. Client in the hallway outside the courtroom for approximately five minutes.
14. Mr. Prior Lawyer conveyed the DA's offer, which was a plea to attempted CPCS 7th (B misdemeanor), with an unconditional discharge and a 6 month license suspension.
15. Mr. Client told Mr. Prior Lawyer that the cocaine belonged to his brother-in-law, to which Mr. Prior Lawyer responded: "If drugs are found in a car that you are driving, you are considered to be in possession of them, unless there is evidence that they belong to someone else. The jury can find you guilty based on that."
16. Mr. Client also told Mr. Prior Lawyer that the cop had no reason to stop the car because he had come to a complete stop at the stop sign.
17. Mr. Prior Lawyer told Mr. Client that it would be nearly impossible to convince the judge that the stop was unlawful.
18. Mr. Prior Lawyer advised Mr. Client to accept the offer, and said that if he was convicted after trial, he would probably get probation, and if he violated that he could even end up doing some jail time.
19. Mr. Client was anxious to resolve the case quickly because he did not want his employer to find out about it and fire him; the mention of possible jail time made him very nervous. Between arrest and arraignment, he and his wife had discovered that she was pregnant, and he was very aware that he needed to keep his job.
20. Mr. Client did not own a car and rarely drove, so the license suspension did not really matter to him.

21. Mr. Prior Lawyer told Mr. Client to “think about it” while he met with other clients.
22. Mr. Client called his wife to tell her the situation, and they both agreed that he should follow Mr. Prior Lawyer’s advice and “get it over with.”
23. Mr. Client accepted the DA’s offer and pleaded guilty at arraignment.
24. Mr. Client’s brother-in-law was also charged with a violation of N.Y. Penal Law § 220.03; he eventually resolved the charge for a plea to a disorderly conduct violation (N.Y. Penal Law § 240.20) and a one year conditional discharge.¹
25. Mr. Prior Lawyer did not say anything about immigration status or potential immigration consequences at any time during his representation of Mr. Client.
26. There are no notes in Mr. Prior Lawyer’s file indicating that Mr. Prior Lawyer mentioned immigration consequences to Mr. Client.
27. It did not occur to Mr. Client at any point that the conviction would make him deportable, or that there would be any penalty besides what his attorney described.
28. During the change of plea hearing, after Mr. Prior Lawyer waived the formal reading of the charge, the judge asked Mr. Client whether he wished to plead guilty and Mr. Client responded “yes.” The judge then conducted the colloquy, addressing the facts supporting the conviction, the waiver of the right to a jury trial, the waiver of confrontation, and other trial rights. Mr. Client answered “yes” or “yes, sir” to all of the judge’s questions. *See Ex. A (3/25/09 plea minutes).*
29. At the conclusion of the plea colloquy, the judge said to Mr. Client, “You should be aware that if this plea has a negative effect upon your immigration status, you would not

¹ The brother-in-law was initially offered the same plea as Mr. Client, but he rejected it because he drives a delivery truck for a living, and was unwilling to accept the license suspension. The brother-in-law’s attorney explained the situation to the DA, and proposed the plea to disorderly conduct and a one year conditional discharge, to which the DA eventually agreed.

be allowed to withdraw your plea; do you understand that?” Mr. Client replied “Yes, sir.” Mr. Client was too intimidated to speak up in open court and admit that he didn’t understand what the judge meant. Mr. Client was also quite nervous at the change of plea, which interfered with his ability to process quickly what the judge was saying. Mr. Client had already told the judge that he wished to plead guilty, and had waived all of his constitutional rights; it did not occur to him that he should or could pull out of the plea agreement at that time. Mr. Client did not understand that “negative effect” could have meant deportation.

30. This guilty plea had serious immigration ramifications for Mr. Client; the plea to possession of a controlled substance rendered him deportable (removable). *See* 8 U.S.C. § 237(a)(2)(B)(i).
31. The statute states: “Any alien who at time after admission has 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 thirty grams or less of marijuana is deportable.”
32. The conviction also rendered Mr. Client ineligible for relief from deportation, known as cancellation of removal, because he committed the offense within seven years of establishing residence in the United States. *See* 8 U.S.C. § 1229b(d)(1) (commonly referred to as the “stop-time” rule).
33. In October 2013, Mr. Client and his wife traveled to Mexico for a long overdue honeymoon. Upon his return, immigration officials detained Mr. Client at the airport.

This was the first time that Mr. Client became aware of the immigration consequences of his plea. Mr. Client has remained in ICE detention since that time.

34. Mrs. Client contacted me on 10/9/13 and told me what had happened to her husband at the airport; I told her it was likely that he would be put in deportation proceedings because of the controlled substance conviction.
35. On 10/16/13, I was able to confirm with ICE that Mr. Client was being detained and charged as deportable due to the controlled substance conviction.
36. On 10/19/13, Mr. Client retained me to file a Motion to Vacate the Conviction based on Mr. Prior Lawyer's failure to inform Mr. Client that the conviction carried the additional penalty of deportation.
37. Mr. Prior Lawyer's recollection does not conflict with Mr. Client's account; Mr. Prior Lawyer has no memory of providing Mr. Client with any advice as to immigration consequences. Mr. Prior Lawyer also concedes that there are no notes in his file indicating that he advised Mr. Client that the conviction would render him deportable.
38. Mr. Prior Lawyer states that, in March 2009, he understood that a controlled substance conviction was a deportable offense, and if the client told him that he was a green card holder he would advise him that the plea would make him deportable but that if he stayed out of jail he would probably not get deported.ⁱ
39. Mr. Prior Lawyer states that it was not his practice in 2009 to ask every defendant whether he was a citizen, although he does so currently.
40. Mr. Client has consistently stated that he would have rejected the plea bargain and proceeded to trial if he had known that the guilty plea would render him deportable.

41. Mr. Client further states that if had known that there was even a chance of deportation as a result of the guilty plea, he would not have accepted it.
42. Mrs. Client confirms that Mr. Client spoke with her on the phone after Mr. Prior Lawyer conveyed the plea offer to Mr. Client, and before he accepted it, and that they decided that he should follow his lawyer's advice and "get it over with," since it was the best deal he could get, and they did not want his employer to find out about the conviction.
43. Mr. Client states that he would have asked Mr. Prior Lawyer to negotiate a plea to a Disorderly Conduct violation, like his brother-in-law received, in exchange for dismissal of the possession of a controlled substance charge, and would have agreed to a conditional discharge, probation, or even time to serve in jail, had he been correctly advised that the guilty plea to attempted possession of a controlled substance would render him deportable.
44. If Mr. Prior Lawyer had been unable to negotiate a non-deportable resolution, Mr. Client would have gone to trial on the charge, even though that meant risking a more severe sentence, because avoiding deportation was so important to him.
45. Mr. Client believed that he had a valid defense to assert at trial because the car and the cocaine did not belong to him, and he was not aware that it was in the glove compartment until it fell out.
46. Mr. Client's detention and imminent deportation are based solely on his 2009 plea to attempted criminal possession of a controlled substance. *See* U.S. Dept. of Homeland Security "Notice to Appear" (Ex. B); *see also* Order of Removal (Dec. 15, 2013) (Ex. C).
47. N.Y. Crim. Proc. Law § 440.10(1)(h) provides that any time after judgment is entered, a court may vacate a conviction upon the grounds that it was "obtained in violation of a

right of the defendant under the constitution of this state or of the United States.” As detailed in the attached MEMORANDUM OF LAW, Mr. Client asserts that Mr. Prior Lawyer’s failure to inform him that the guilty plea rendered him deportable, and failure to negotiate a reasonably available non-deportable resolution, constitute separate violations of Mr. Client’s right to effective assistance of counsel under the United States and New York Constitutions. Mr. Client also asserts that the court’s failure to provide a notification regarding deportation violates the federal and state constitutions.

48. Mr. Client has included sufficient incontrovertible facts in this Motion to establish that the court failed to provide a notification regarding deportation, that his attorney failed to advise him of the deportation penalty attached to the guilty plea, that his attorney failed to negotiate effectively to avoid the deportation penalty, and that he suffered prejudice as a direct result of the errors committed by the court and his attorney; therefore, Mr. Client asks this court to grant his motion pursuant to N.Y. Crim. Proc. Law § 440.30(3). An evidentiary hearing will serve no purpose as Mr. Prior Lawyer has provided an affidavit stating that he has no recollection of providing any advice regarding deportation to Mr. Client, and such lack of advice is supported by the criminal case file. In the alternative, Mr. Client asks this court to order a hearing pursuant to N.Y. Crim. Proc. Law § 440.30(5).
49. If the People consent to the motion, Mr. Client is prepared to enter a guilty plea to Disorderly Conduct (N.Y. Penal Law § 240.20) and to accept the sentence that the court deems appropriate.

WHEREFORE, the affiant respectfully requests this Court to grant the relief sought herein and reserve to defendant the right to amend or supplement this motion for such other and further relief as this court may deem just and proper.

DATED: NEW YORK, NEW YORK
 _____, 2014

LAWYER, ESQ.

ⁱ You must briefly explain what the previous defense attorney says about the advice he gave your client vis-à-vis immigration consequences. If you are not able to get an affidavit from the attorney to include as part of the 440 motion, you must explain why not. This explanation should include details about your diligent attempts to find the attorney and a compelling reason why you were not able to find the attorney or get an affidavit from him.