**Practice Notes:**

1. This is a draft motion seeking appointment of *Padilla* (immigration) expert for cases involving indigent defendants. It is provided for your convenience only. Tailor it as you wish.
2. You may wish to file this as an *ex parte* motion and/or mark it as containing sensitive data.
3. For reasons related to subsequent immigration litigation, it is recommended that you avoid stating in the filing your client’s citizenship/immigration status. Ideally the text accompanying n4 (specifying that providing effective assistance to *this* client requires *Padilla* advice) would be sufficient.

[CAUSE NUMBER]

STATE OF TEXAS )

) In the [COURT]

vs. ) [COUNTY], Texas

)

CLIENT )

**MOTION FOR APPOINTMENT OF DEFENSE EXPERT**

CLIENT, Defendant in this cause, moves the Court to appoint an immigration expert to assist undersigned counsel in this case and, in support thereof, would show the following:

The “basic tools of an adequate defense” must “be provided to those defendants who cannot afford to pay for them.”[[1]](#footnote-2) Undersigned counsel is appointed to represent CLIENT, who is indigent[[2]](#footnote-3) and cannot afford expert fees.[[3]](#footnote-4)

Providing effective assistance of counsel to CLIENT requires advising him/her of the immigration consequences of a disposition of this matter.[[4]](#footnote-5)Advice provided under *Padilla* must be specific and tailored to the client’s circumstances.[[5]](#footnote-6) Statements in plea papers and the trial court admonishment do not satisfy the demands of *Padilla*.[[6]](#footnote-7)

Recognizing that defense lawyers are not immigration law specialists, the Court of Criminal Appeals “anticipate[s] and expect[s] . . . that criminal defense lawyers will rely on their immigration-law counterparts” in order to provide effective assistance of counsel.[[7]](#footnote-8) This motion seeks this Court’s authorization to do just that.

Finally, *Padilla* recognizes that “informed consideration” of immigration consequences will benefit the defense and prosecution during the plea-bargaining process, allowing both sides to “reach agreements that better satisfy the interests of both parties.”[[8]](#footnote-9) To so bring immigration consequences into negotiations, Counsel must first understand what those consequences are.

Courts have described immigration law as “second only to the Internal Revenue Code in complexity”[[9]](#footnote-10) and “dizzying,”[[10]](#footnote-11) likening it to “King Minos’s labyrinth in ancient Crete.”[[11]](#footnote-12) The Fifth Circuit bemoans that the law “yield[s] up meaning only grudgingly”[[12]](#footnote-13) and it is, accordingly, well beyond the understanding of a lay person and suitable for the appointment of an expert.[[13]](#footnote-14)

Without appointment of the requested expert, Counsel risks inability to comply with *Padilla* and thus invites vacatur.[[14]](#footnote-15) Evaluation of the immigration consequences of this case by a qualified immigration expert as an agent for the defense is necessary in order to allow counsel for the Defendant to provide constitutionally effective assistance in this cause.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully moves this Court to authorize undersigned defense counsel to retain as defense expert: nonprofit immigration legal service organization myPadilla [or Attorney X] to provide a written legal memorandum for defense counsel regarding the specific immigration consequences to CLIENT of the charged offense(s) at a cost of $300 [or Attorney X fee].

Respectfully submitted,

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[SIGNATURE BLOCK]

**CERTIFICATE OF SERVICE**

I certify that a copy of Defendant’s Motion for Appointment of Defense Expert has been delivered to the [ ], on this date of \_\_\_\_\_\_ \_\_\_, 20\_\_.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[SIGNATURE BLOCK]

[CAUSE NUMBER]

STATE OF TEXAS )

) In the [COURT]

vs. ) [COUNTY], Texas

)

CLIENT )

**ORDER**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant’s Motion for Appointment of a Defense Expert is hereby GRANTED/DENIED this the \_\_\_\_\_ day of \_\_\_\_\_\_\_, 20\_\_\_.

IT IS FURTHER ORDERED that expert \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ tender the report only to the Attorney for Defendant.

IT IS FURTHER ORDERED that the funds in an amount not to exceed $\_\_\_\_\_\_\_\_\_ shall be provided for the payment of the fees of the said expert.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

JUDGE PRESIDING

1. *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). [↑](#footnote-ref-2)
2. Tex. Crim. Proc. Code Ann. Art. 26.04. [↑](#footnote-ref-3)
3. Tex. Crim. Proc. Code Ann. Art. 26.05(d). [↑](#footnote-ref-4)
4. *Padilla v. Kentucky*, 559 U.S. 356 (2010). [↑](#footnote-ref-5)
5. *See Ex Parte Torres,* 483 S.W.3d 35 (Tex. Crim. App. 2016)(finding attorney ineffective where hetold client to consult an immigration lawyer, said that the plea could result in immigration consequences, and recommended that client get an immigration lawyer if he ultimately faced immigration consequences); *Ex parte Castaneda*, No. 05-17-01135-CR, 2018 WL 992024, at \*4 (Tex. App.—Dallas 2018) (holding it a violation of first prong of *Strickland* where “trial counsel admitted that he did not offer appellant any immigration advice and instructed him to contact an immigration lawyer and satisfy himself about the immigration consequences of the plea”). [↑](#footnote-ref-6)
6. *Ex Parte De Los Reyes*, 350 S.W.3d 723 (Tex. App.—El Paso 2011) (finding that statement in plea papers did not satisfy counsel’s duty), *rev’d on other grounds*, 392 S.W.3d 675 (Tex. Crim. App. 2013); *Ex Parte Romero*, 351 S.W.3d 127 (Tex. App.—San Antonio 2011) (finding counsel’s duty not met by trial court admonishment), *vacated on other grounds*, 393 S.W.3d 788 (Tex. Crim. App. 2013). [↑](#footnote-ref-7)
7. *Ex Parte Aguilar*, 537 S.W.3d 122, 127-28 (Tex. Crim. App. 2017) (extending *Padilla* to circumstance in which the consequence is “loss of legal nonimmigrant status” rather than removal). [↑](#footnote-ref-8)
8. *Padilla*, 559 U.S. at 373. [↑](#footnote-ref-9)
9. *Castro-O’Ryan v. U.S. Dept of Immigration & Naturalization*, 847 F.2d 1307, 1311 (9th Cir. 1988) (internal citations omitted). [↑](#footnote-ref-10)
10. *Padilla* at 378. [↑](#footnote-ref-11)
11. *Lok v. Immigration and Naturalization Service*, 548 F.2d 37, 38 (2d Cir. 1977). [↑](#footnote-ref-12)
12. *Kwon v. Immigration & Naturalization Serv.*, 646 F.2d 909, 919 (5th Cir. 1981). [↑](#footnote-ref-13)
13. *Elmore v. State*, 968 S.W.2d 462 (Tex. App.—Eastland 1998) (extending *Ake* to noncapital case and nonmedical expert). [↑](#footnote-ref-14)
14. *Rey v. State*, 897 S.W. 2d 333, 346 (Tex. Crim. App. 1995) (“Accordingly, we hold that the denial of the appointment of an expert, consistent with *Ake*, amounts to structural error which cannot be evaluated for harm.”). [↑](#footnote-ref-15)