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SUPREME COURT
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RON DOUGLAS PATTERSON,
Defendant and Petitioner

CASE No. ____________________
Fourth Dist. No. E060758

Related Case No. ______________
(Re Denial of Habeas Petition)
Fourth Dist. No. E061436

PETITION FOR REVIEW

– ooOoo –

Following Denial of Appeal from the Judgment of
The Superior Court State Of California, County Of Riverside
Docket No. EE220540

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TABLE OF CONTENTS

Why Review Should Be Granted 1

Issues Presented for Review 3

Statement of the Case 4

A. Underlying Facts and Prejudgment Proceedings 4

B. Immigration and Professional Consequences of the Pleas and Convictions 6

C. Post-Judgment Proceedings in the Trial Court 9

D. Proceedings in the Court of Appeal 10

The Court Should Grant Review to Clarify the Duty of Representation Afforded to Noncitizen Defendants in Plea Negotiations And What Constitutes "Prejudice" When That Duty Is Breached 11

A. Counsel's Duty, And Its Breach 11

B. The Lower Courts' Failure Properly To Assess Prejudice 19

C. The Denial of Petitioner's Motion to Withdraw His Plea Constituted An Abuse of Discretion 25

Conclusion 29

Certification Regarding Format of Brief

Proof of Service By Mail

LIST OF EXHIBITS

A. Court of Appeal's Opinion (Re Denial of Habeas Petition and Direct Appeal)

B. Court of Appeal's Order (Summarily Denying Habeas Petition)

C. Declaration of CHP Officer Robert West

D. Declaration of Norton Tooby, Esq.

E. "Order re Petition for Writ of Habeas Corpus" (Superior Court)

TABLE OF AUTHORITIES

Cases

In re Alvernaz, 2 Cal.4th 924 (1992) 24

United States v. Bonilla, 637 F.3d 980 (9th Cir. 2011) . . . . *passim*

Campos v. State, 798 N.W.2d 565 (Minn. Ct. App. 2011) 28

Commonwealth v. DeJesus, 468 Mass. 178, 9 N.E.2d 789 (Sup. Jud Ct. Mass 2014) 14, 27

Hill v. Lockhart, 474 U.S. 52 (1985) 12, 19

INS v. Street Cyr, 533 U.S. 289 (2001) 13

State v. Kostyuchenko, 2014 Ohio 324, 2014 Ohio App. LEXIS 309 (Ohio Ct. App. 2014) . . . 27

Marriage of LaMusga, 32 Cal.4th 1072 (2004) 27

Matter of Abreu-Semino, 12 I. & N. Dec. 775 (BIA 1968) 22

Matter of Batista-Hernandez 21 I. & N. Dec. 955 (BIA 1997) 22

McMann v. Richardson, 397 U.S. 759 (1970) 11

State v. Nunez-Valdez, 200 N.J. 129, 975 A.2d 418 (N.J. 2009) 28

United States v. Orocio, 645 F.3d 630 (3rd Cir. 2011) 19, 22

United States v. Urias-Marrufo, 744 F.3d 361 (5th Cir. 2014) 27

Padilla v. Kentucky, 559 U.S. 356 (2010) . . . . *passim*

People v. Barocio, 216 Cal. App. 3d 99 (1989) 3

People v. Bautista, 115 Cal.App.4th 229 (2004) 3, 25

People v. Johnson, 47 Cal. 4th 668 (2009) 26

People v. Martinez, 57 Cal. 4th 555 (2013) . . . . *passim*

People v. Ramirez, 141 Cal. App. 4th 1501 (2006) 21

People v. Shokur, 205 Cal. App. 4th 1398 (2012) 19

People v. Soriano, 194 Cal.App.3d 1470 (1987) 3, 12

People v. Superior Court (Zamudio), 23 Cal. 4th 183 (2000) 19

In re Resendiz, 25 Cal.4th 230 (2001) 22

Strickland v. Washington, 466 U.S. 668 (1984) 11, 12, 23

State v. Yuma, 286 Neb. 244, 835 N.W.2d 679 (Neb. 2013) 28

Constitutions and Statutes

United States Constitution, Sixth Amendment . . . . *passim*

United States Constitution, Fourteenth Amendment . . . . *passim*

California Constitution, article I, section 15 . . . . *passim*

8 U.S.C. § 1227(a)(2)(B)(i) 7, 9, 12

Pen. Code § 18 23

Penal Code § 32 23

Penal Code § 33 23

Penal Code § 1000 . . . . 7, 9

Penal Code § 1016.5 . . . . *passim*

Penal Code § 1018 . . . . 4, 25, 26

PETITION FOR REVIEW

--ooOoo--

To the Honorable Tani Cantil-Sakauye, Chief Justice, and to the Honorable Associate Justices of the California Supreme Court:

Petitioner Ron Douglas Patterson petitions this Court for review of the Opinion filed on March 9, 2015, by the Court of Appeal, Fourth Appellate District, Division Two, denying Petitioner's direct appeal and (interrelated) petition for writ of habeas corpus.[1]

WHY REVIEW SHOULD BE GRANTED

The crux of this case is simple and undisputed: Petitioner, who is not a citizen of the United States, agreed to plead guilty to a minor drug possession offense – not knowing that doing so guaranteed his automatic, mandatory deportation and permanent banishment from this country. Although his trial lawyer was aware of Petitioner's immigration status, she made no effort to determine the immigration effect of the plea bargain she recommended, and certainly did not advise him of the disastrous consequences that would result.

As such, this case presents a straightforward instance of a denial of the effective assistance of counsel under the Sixth Amendment as set forth by the United States Supreme Court in *Padilla v. Kentucky,* 559 U.S. 356 (2010). *Padilla* holds that counsel for a noncitizen defendant who is deciding whether to plead guilty to a criminal offense has a constitutional duty to investigate the immigration consequences of the proposed plea, and if it is clear that the resulting conviction will result in mandatory deportation, to so advise the

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[1]A copy of the Court of Appeal's (unpublished) opinion denying Petitioner's appeal and explaining its denial of Petitioner's habeas corpus petition is attached to this Petition as Exhibit "A." The Court of Appeal's separate summary order, formally denying the habeas petition is attached as Exhibit "B."

client.[2] *Id.* at 369, 371. The immigration provision which dooms Petitioner in this case is exactly the same one that the *Padilla* Court described as "succinct, clear and explicit," and faulted counsel in that case for not warning her client about. *Id.* at 368.

The Court of Appeal insists that *Padilla* does not mean what it clearly says. Instead, according to the Court of Appeal, if the defendant is generally aware of the *possibility* of adverse immigration consequences, counsel only breaches her duty if she gives the defendant "affirmative misadvice" about what will follow. While there was indeed "affirmative misadvice" in the facts of *Padilla*, the Supreme Court explicitly considered and explicitly rejected such a limited holding, and instead made clear counsel's duty to investigate and advise the defendant about certain deportation – the duty violated here. *Id.* at 369-71.

There are thus several compelling reasons for the Court to grant review in this case. Insuring fairness in the treatment of guilty pleas by noncitizen defendants is a matter of great and ever-increasing public importance in California. See, *People v. Martinez*, 57 Cal. 4th 555, 563-64 (2013), and statutes and cases discussed therein. When – as in this case – the lower courts either fail to understand or refuse to apply a clearly articulated holding of the United States Supreme Court, the uniform and appropriate adjudication of such matters is gravely imperiled.

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[2]The Court went on to hold that, if the defendant has not received adequate advice, she or he is constitutionally entitled to withdraw the plea upon a showing that "a decision to reject the plea bargain would have been rational under the circumstances." *Id.* at 372. As will be shown, there are several powerful reasons – none of them acknowledged by the court below – why it would have been rational for Petitioner to have rejected the plea bargain had he known of the looming immigration catastrophe.

In addition, the opinion of the Court of Appeal is in direct and irreconcilable conflict with the published opinions of other California appellate courts, including *People v. Bautista*, 115 Cal.App.4th 229, 238 (2004) [holding counsel was under duty to investigate alternative immigration-safe offenses and to attempt to negotiate a plea to them]; and *People v. Soriano*, 194 Cal.App.3d 1470, 1480-82 (1987) [holding it insufficient for counsel to provide general warning that defendant could possibly be deported; counsel under duty to research and advise client about actual effects]; see also, *People v. Barocio*, 216 Cal. App. 3d 99, 107 (1989).

The need for guidance from this Court is thus manifest. The Court should grant review because it is "necessary to secure uniformity of decision [and] to settle an important question of law." Cal. Rule of Ct. 8.500 (b).

ISSUES PRESENTED FOR REVIEW

1. Whether counsel representing a noncitizen criminal defendant in plea negotiations has a duty to investigate the immigration consequences of a proposed plea and to advise the defendant of those consequences when they are clear and readily discerned

2. Whether, in determining whether a noncitizen defendant has shown that a decision to reject a given plea bargain "would have been rational under the circumstances," the court must consider: (a) the impact that adverse immigration consequences would have on the defendant's life; (b) whether the defendant had good reason to believe that he or she had a "triable case"; (c) whether there was an alternative "immigration-safe" disposition available that carried the same penal weight and sentence; and (d) whether, by later challenging the validity of the plea, the defendant has demonstrated that he or she is willing

to forego the benefit of the plea bargain and face the same risks she or he initially confronted.

3. Whether the fact that a noncitizen defendant has been advised of the possibility that a guilty plea "may" have adverse immigration consequences necessarily bars the defendant from withdrawing that plea, pursuant to Penal Code §1018, when he or she discovers that disastrous immigration consequences will certainly and unavoidably result from the plea.

STATEMENT OF THE CASE

A. Underlying Facts and Prejudgment Proceedings

Petitioner Ron Patterson – known as Ryan – came to the United States from his native Canada in 1996. (CT:38, 41). He entered and remains in this country legally, on a work visa; his application for Lawful Permanent Resident status has been pending since 2009, and his fondest wish is eventually to become a United States citizen. (CT:38-39, 41). He was and is a registered nurse, working in the cardiac care unit at Eisenhower Medical Center in Rancho Mirage, California.[3] (CT:38, 51, 54).

Petitioner had never been in any legal trouble until July 11, 2011, when a police officer saw him driving very erratically down a freeway. (CT:37, 73). Although the officer signaled for him to pull over, Petitioner kept driving, exited the freeway, and sideswiped another car going in the opposite direction before finally coming to a stop. When at the

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[3]In the appellate record are a large quantity of supportive letters from Petitioner's co-workers and other community members, attesting to his diligence and sobriety. (CT:51-66). But more eloquent than those, even, is the fact that the hospital has kept him in its employ, despite his plea, while he attempts to straighten out his legal situation. (See, *e.g.*, CT:51).

officer's direction, Petitioner got out of his car, he was wildly disoriented. A subsequent search of his car turned up a round metal box containing small, personal-use baggies of substances that tested positive for cocaine, morphine, ecstasy, methamphetamine, and PCP. (CT:37, 73-74).

An Amended Complaint was filed in the Superior Court, Riverside, on October 22, 2012, charging Petitioner with fleeing a police officer, in violation of Vehicle Code section 2800.2 (Count 1); with transportation of small amounts of methamphetamine (Count 2) and cocaine (Count 3), in violation of Health and Safety Code sections 11379(a), and 11352(a), respectively, and with possession of small amounts of cocaine (Count 4), morphine (Count 5), MDMA (or "ecstasy" – Count 6), methamphetamine (Count 7), and PCP (Count 8), in violation of Health and Safety Code §§11377(a) and 11350(a). (CT:7-8).

The case was not quite as simple as it first appeared: Petitioner was subjected to a Breathalyzer test and the police obtained a blood sample; the breath test showed that he was not under the influence of alcohol, and "a report was submitted of the blood results, **finding no controlled substances in the Defendant's blood**." (Exh. C [Dec. of CHP Officer Robert E. West, in Support of Arrest Warrant] at p. 1 [emphasis supplied]). Instead, he was subsequently diagnosed with hypoglycemia and vasovagal syncope after (following his arrest and release) he suffered two more attacks, one of which ended in unconsciousness and a serious fall, resulting in hospitalization. (CT:37-38). That condition, he maintains, is the only possible explanation for his utterly uncharacteristic driving behavior that day. The sample box of drugs, he explains, had been left in his car – unbeknownst to him – by a

friend-of-a-friend to whom he gave a ride, two days earlier. (CT:37-38, 44-45, 47-50). The passenger was subsequently identified as one Fred Kluth, a real estate agent from the Bay Area, who had been seen with the metal box, by an independent witness, on the evening of July 17, 2011, just before he got into Petitioner's car. (CT:46). Petitioner did not drive the car between the trip during which he gave Mr. Kluth a ride (on July 17th) and the fateful incident which gave rise to his arrest on July 19, 2011. (CT:37-38).

Nonetheless, presented with a seemingly lenient "take-it-now-or-leave-it" offer from the prosecutor on the day of his preliminary hearing, Petitioner – on the recommendation of his trial counsel – agreed to plead guilty to the count involving evading an officer, and a count charging simple possession of MDMA. (CT:38).

On March 13, 2013 – the same day that the prosecution's plea offer was made and the plea bargain accepted – Petitioner entered a plea of guilty to the felony violation of Vehicle Code §2800.2, charged in Count 1 and to the felony violation of Health & Safety Code §11377(a), charged in Count 6. The remaining counts were dismissed pursuant to the plea bargain. The trial court immediately went "straight to sentencing;" it suspended imposition of sentence, and placed Petitioner on three years formal probation, on condition he serve 180 days in the county jail minus 3 days for credit time served, the balance to be served on work release. (RT:2; CT:18-22).

B. Immigration and Professional Consequences of the Pleas and Convictions

Petitioner's trial counsel, Tera Harden, was aware that he was a citizen of Canada. (CT:38; Exh. D at p. 3 [Dec. of Norton Tooby, Esq.]). Trial counsel told Petitioner that,

because she did not practice immigration law, she could not tell him what effect his plea would have on his immigration status (CT:38), but she did read him the warning language set forth in Penal Code §1016.5, to the effect that a conviction "may have" adverse immigration consequences (Exh. D at p. 3), and in completing the Superior Court's "Felony Plea Form," Petitioner initialed a paragraph to the same effect. (CT:21).

On March 12, 2013 – the day before the prosecution proposed the plea bargain that was ultimately accepted – trial counsel proposed her own plea bargain to the prosecution, offering for Petitioner to plead, *inter alia*, to two counts of possession of a controlled substance, in violation of Health & Safety Code §11377(a), in return for (*inter alia*) a sentence of Deferred Entry of Judgment under Penal Code §1000. (CT:46).

It was not until after Petitioner accepted the plea bargain, entered a guilty plea, was convicted and sentenced that he learned that the "convictions make my deportation mandatory, with no waiver of deportation possible; my application for a green card must be denied, and the immigration judge has no power to release me from mandatory immigration detention on bond during removal proceedings." (CT:38). The specific immigration effects of Petitioner's convictions are detailed in the record by immigration attorney Stacy Tolchin:

> The conviction . . . of possession of a small amount of MDMA (ecstasy), in violation of Health & Safety Code § 11377(a), has disastrous immigration consequences for him. First, it is considered a conviction of a controlled substances offense, triggering deportation. 8 USC § 1227(a)(2)(B)(i). Second, it triggers inadmissibility as a controlled substances conviction. 8 USC §1182(a)(2)(A)(i)(II). There is no waiver available for these grounds of

> removal. See 8 USC §1229b(a) (cancellation of removal requires lawful permanent resident status, which Mr. Patterson does not yet have). Finally, this conviction triggers mandatory immigration detention during removal proceedings, from which the Immigration Judge has no authority to release him. 8 USC §§1226(c)(1)(A), (B). The net effect of these adverse immigration consequences is that Mr. Patterson is subject to arrest at any time on deportation charges, the Immigration Judge has no authority to release him from mandatory ICE detention on bond or otherwise, and he is barred from obtaining the Lawful Permanent Resident status for which he is otherwise qualified. This surely qualifies as an immigration disaster. These are not merely possible immigration consequences: they are certain. It is only a matter of time before these adverse immigration consequences impact his life.

(CT:41-42; see also, Exh. D at p. 2 [Dec. of N. Tooby, Esq.]).

Similarly after the fact, Petitioner also learned of another, related disaster that no one had mentioned before he accepted the plea bargain: The convictions gave rise to an "Accusation" filed by the Board of Registered Nursing which, if sustained, will result in the loss of his profession and livelihood. (CT:38; see also CT:67, *et seq.*).

The plea bargain proposed by trial counsel would have had the exact same, disastrous immigration and professional consequences as the one that Petitioner ultimately accepted. Despite her awareness of Petitioner's noncitizen status, trial counsel never told Petitioner – apparently because she never bothered to find out herself – of the absolute certainty of the devastating consequences that would be triggered by a plea of guilty under either the plea bargain she proposed or the one Petitioner ultimately accepted on her recommendation: the deportation, the bar from securing his pending lawful permanent resident status, mandatory

immigration detention, during removal proceedings, without possibility of release on bond, and the permanent loss of his Registered Nursing license, which will follow him into deportation. (CT:38; Exh D at p. 3). Ms. Harden also failed to investigate, discover, or propose an alternative equivalent disposition that would avoid the immigration disaster – even though one clearly existed. (*Id.* at pp. 3-4).

C. Post-Judgment Proceedings in the Trial Court

On September 13, 2013, Petitioner (represented by new counsel) filed a "Motion to Withdraw Plea," pursuant to Penal Code §1018. (CT:25, *et seq.*). Following briefing and a short hearing, the trial court denied the 1018 motion on January 8, 2014. (CT:93; RT:4-11). In ruling from the bench, the trial court acknowledged that "the federal consequences are disastrous," but held that the fact Petitioner had been advised (*per* §1016.5) that adverse immigration consequences "may" result from his convictions barred him from making out the "good cause" to withdraw his plea required under §1018. (RT:7-9, 10-11).

On May 23, 2014, Petitioner filed a Petition for Writ of Habeas Corpus in the Riverside Superior Court setting forth the same claims asserted in this Petition. In an order filed on May 29, 2014 the Superior Court summarily denied the petition. By way of explanation, the trial court opined that "the petition fails to state a prima facie case" and "Petitioner has failed to establish prejudice" because (a) he had received notice per section 1016.5 that his conviction "may have" adverse immigration consequences; (b) it was not reasonably likely that the jury would have accepted his defense; (c) pursuant to his plea he was convicted of "wobblers" that can be reduced to misdemeanors, while if he had gone to

trial he might have been convicted of "an irreducible felony and the same deportation consequences would apply;" and (d) he could have gone to trial if he wanted, but the trial judge found that he understood and waived his constitutional rights.[4] (Exh. E at pp. 2-3).

D. Proceedings in the Court of Appeal

Petitioner timely filed a notice of appeal regarding the denial of his motion to withdraw the plea (CT:94), and the trial court issued a Certificate of Probable Cause to Appeal on March 7, 2014. (CT:97). While the appeal was pending, Petitioner filed an Original Petition for Writ of Habeas Corpus in the appellate court, which ordered "informal briefing" as to whether an order to show cause should issue.

Although the Court of Appeal declined formally to consolidate the direct appeal and the habeas corpus proceeding, it issued a single "tentative opinion" as to both, scheduled them to be argued jointly, and ultimately filed a single opinion setting forth its reasons for denying both cases. (See, Exh. A).

The rationale given for denying both Petitioner's direct appeal and his habeas corpus petition – basically, that Petitioner was adequately advised of the immigration consequences of his plea when he was informed, *per* section 1016.5, that there was *some* risk a guilty plea could result in deportation – will be discussed presently, as will the appellate court's unavailing efforts to distinguish *Padilla v. Kentucky*

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[4]As will be discussed, the first two of these explanations depend on notions of the law that are in direct opposition to the opinion of the United States Supreme Court in *Padilla v. Kentucky,* while the last two are simply *non sequiturs*.

The Court Should Grant Review to Clarify the Duty of Representation Afforded to Noncitizen Defendants in Plea Negotiations and What Constitutes "Prejudice" When That Duty Is Breached

A. Counsel's Duty, And Its Breach

"Before deciding whether to plead guilty, a defendant is entitled to 'the effective assistance of competent counsel.'" *Padilla v. Kentucky*, 559 U.S. at 364; citing, *McMann v. Richardson*, 397 U.S. 759, 771 (1970); and *Strickland v. Washington*, 466 U.S. 668, 686 (1984). When, as here, the defendant is not a citizen of the United States, the definition of what constitutes "effective assistance of counsel" takes on a special and quite specific contour. As this Court reiterated:

> That a defendant might reject a plea bargain because it would result in deportation, exclusion from admission to the United States, or denial of naturalization is beyond dispute. [¶] "[D]eportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." Further, """"preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." 'Likewise, we have recognized that 'preserving the possibility of' discretionary relief from deportation ... 'would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.' " [¶] In sum, our Legislature, the United States Supreme Court, and this court have recognized that the defendant's decision to accept or reject a plea bargain can be profoundly influenced by the knowledge, or lack of knowledge, that a conviction in accordance with the plea will have immigration consequences.

People v. Martinez, 57 Cal. 4th 555, 563-64 (2013); quoting, *Padilla,* 559 U.S. at 364, 368.

The United States Supreme Court squarely held in *Padilla* that when the defendant is a noncitizen, an essential component of effective assistance is to research the immigration effects of the proposed plea and if – as in this case – it is "truly clear" that the resulting conviction will certainly result in mandatory deportation, counsel has a duty to tell the defendant. *Padilla*, 559 U.S. at 369, 371. The Supreme Court could not have been more explicit in holding that "the failure to do so" – *i.e.*, the failure to investigate basic immigration consequences, and to advise the client accordingly – "'clearly satisfies the first prong of the *Strickland* analysis.'" *Id.* at 369; quoting, *Hill v. Lockhart*, 474 U.S. 52, 62 (1985); see also, *People v. Soriano,* 194 Cal.App.3d at 1481-82.

The application of *Padilla* to the instant case is quite straightforward. It is undisputed that trial counsel knew that Petitioner was a noncitizen. It is plain on the record that counsel both proposed a plea bargain herself, and then recommended that Petitioner accept a prosecution plea bargain, both of which entailed guilty pleas to a drug offense that would result in her client's mandatory and permanent deportation from the United States. Indeed, the exact same immigration provision in play in *Padilla* – the one described by the Supreme Court as "succinct, clear and explicit in defining the removal consequence of . . . conviction" – is the one that will result in Petitioner's deportation if he is not allowed to change his plea. *Padilla,* 559 U.S. at 368; see also, *id.* at 359, n.1 [noting that "virtually every drug offense except for only the most insignificant marijuana offenses, is a deportable offense under 8 U.S.C. §1227(a)(2)(B)(i)."]. Finally, it is clearly established that counsel never informed Petitioner of that fact, and she has admitted that she never bothered to research the matter at

all. (Exh. D at p. 3). In short, the *Padilla* rule fits this case like a glove, and compels the conclusion that Petitioner's counsel failed to provide competent representation.

It is cause for real concern – not just for this petitioner, but for the administration of justice in California – that both the trial court and the Court of Appeal flatly misread the holding of *Padilla* in reaching their contrary conclusions. They got there by relying on two predicates that were specifically considered and rejected by the Supreme Court.

First, both of the lower courts placed great stress on the fact that Petitioner was advised, *per* the statutory advisement required by Penal Code section 1016.5, that "'this conviction may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization.'" (See, Exh. A at pp. 4-5; Exh. E at p. 2). "The evidence clearly shows that defendant was aware of the potential immigration consequences." (Exh. A at p. 6).

The courts below seem to have missed the fact that the petitioner in *Padilla* was provided a generalized warning about the immigration consequences of his plea that was virtually identical to the one mandated under section 1016.5, and provided the petitioner in this case. See, *Padilla*, 559 U.S. at 374 n. 15. More generally, the notion that counsel's duty to a noncitizen client is satisfied by merely advising the client that the proposed plea bargain "*may* have" adverse immigration consequences is utterly untenable under the Supreme Court's holding. *See*, *Padilla,* 559 U.S. at 363-64, 368-69; see also, *INS* v. *St. Cyr*, 533 U.S. 289, 325 (2001) ["There is a clear difference . . . between facing possible deportation and facing certain deportation"]. The courts applying *Padilla* have underscored

this point; in the recent words of Massachusetts's highest court

> Counsel . . . was obligated to provide to his client, in language that the client could comprehend, the information that presumptively mandatory deportation would have been the legal consequence of pleading guilty. Stated differently, counsel needed to convey that, if Federal authorities apprehended the defendant, deportation would be practically inevitable. [¶] Telling the defendant that he was "eligible for deportation," and that he would "face deportation," was not adequate advice because it did not convey what is clearly stated in Federal law. Advice that one is "eligible" for deportation conveys that the law requires additional conditions to be met before an individual could be removed and allows for the exercise of discretion in determining whether those conditions are met. Such advice does not convey what was the case here: that all of the conditions necessary for removal would be met by the defendant's guilty plea, and that, under Federal law, there would be virtually no avenue for discretionary relief once the defendant pleaded guilty and that fact came to the attention of Federal authorities. There is a significant difference, for example, in a lawyer's advice to a client that the client faces five years of incarceration on a charge, as compared to advice that the conviction will result in a five-year mandatory minimum prison sentence."

Commonwealth v. DeJesus, 468 Mass. 178, 181-82 & n. 7; 9 N.E.2d 789, 795-96 & n. 7 (Supreme Jud. Ct. 2014) [other footnote omitted]; *see also, e.g.*, *United States v. Bonilla*, 637 F.3d 980, 984 (9th Cir. 2011) ["A criminal defendant who faces almost certain deportation is entitled to know more than that it is possible that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty. . . . Even if Bonilla was aware, when he pled, of the 'possibility' that he might incur some risk of deportation by entering a plea, this does not show that he would not have gone to trial rather than plead guilty had he

been properly advised that a plea would make his deportation virtually certain." (*Id.*, citing, *Padilla*, 559 U.S. at 368-69)].

This leads to the *second* fundamental error of analysis at the core of the lower courts' decisions. Both courts insisted that *Padilla* simply stands for the proposition that it is ineffective assistance for counsel to provide the noncitizen defendant with "affirmative misadvice" regarding the immigration consequences of a proposed plea bargain. (Exh. A at 5-8, 13 [distinguishing *Padilla* because "There was no misadvisement in this case."]; RT:9 [Trial court: "I don't think *Padilla* is relevant. That has to do with misadvisement. This is not misadvisement."]).

Such an interpretation is a little astonishing, given that the Supreme Court carefully and very explicitly rejected any such limitation on its holding. In fact, the Solicitor General of the United States (which was not a party to *Padilla*) entered the case specifically to argue that the Supreme Court should limit the ambit of ineffective assistance in this context to cases involving misadvice. The Court refused to do so. As the Ninth Circuit reported:

> *Padilla* . . . expressly rejected the notion that *Strickland* guarantees apply only to the active furnishing of erroneous advice about immigration consequences of a plea. Instead, the Court extended the right to counsel to protect against the passive *omission* of correct advice about the possibility of deportation: A holding limited to affirmative misadvice would invite two absurd results. First, it would give counsel an incentive to remain silent on matters of great importance, even when answers are readily available. Silence under these circumstances would be fundamentally at odds with the critical obligation of counsel to advise the client of the advantages and disadvantages of a plea agreement. When attorneys know that their clients face possible exile from

> this country and separation from their families, they should not be encouraged to say nothing at all. Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available. It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation and the failure to do so "'clearly satisfies the first prong of the *Strickland* analysis.'"

United States v. Bonilla, 637 F.3d at 983-84; discussing and quoting, *Padilla v. Kentucky*, 559 U.S. at 370-71 [emphasis in the original; internal citations and signals omitted].

In this case, after Petitioner's counsel pointed out at oral argument that the Court of Appeal's tentative opinion (which simply described *Padilla* as an "affirmative misadvice" case) was contrary to the Supreme Court's express holding, the lower court made a hasty – and ineffectual – effort to bring its decision in line with binding precedent. In its ultimate opinion (filed a few days later) the Court of Appeal noted counsel's argument that "*Padilla* is not limited to instances of affirmative misadvice," and even quoted the Supreme Court's explanation as to why limiting its holding in that way "'would invite two absurd results.'" (Exh. A at 7-8; quoting, *Padilla*, 559 U.S. at 370-71). But the lower court purported to distinguish *Padilla* because "[i]n this case, defense counsel did not remain silent; she informed defendant of potential immigration consequences;" moreover, Petitioner had already hired an immigration attorney, whom he tried (in vain) to get on the phone before the prosecutor's "take it or leave it" offer expired. The Court of Appeal concluded: "Under these circumstance [*sic*], where defendant made his choice to go forward with his plea fully aware of potential immigration consequences and with the ability to figure out the *exact*

immigration ramifications, he cannot now claim IAC in an effort to vacate his plea."[5] (Exh. A at p. 8 [emphasis in original]).

This effort to evade the mandate of *Padilla* is unavailing. As discussed, the Supreme Court was explicit in holding that the duty of a criminal defense attorney representing a noncitizen includes ascertaining, and advising her client of, clear and certain adverse immigration consequences:

> When the law is not succinct and straightforward, a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences. But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear.

Padilla, 559 U.S. at 369 [footnote omitted]; see *United States v. Bonilla*, 637 F.3d 983. As precisely the same, "truly clear" deportation consequence obtains in this case, it was *not* enough for Petitioner's counsel to "do no more than advise" Petitioner that the tendered plea bargain "may carry a risk of adverse immigration consequences." Her duty to advise Petitioner that, just like Mr. Padilla, he was entering a plea that would result in his automatic, mandatory and permanent banishment from this country was "equally clear."

The one additional fact cited by the lower court – that Petitioner had an immigration attorney, whom he tried to reach in the very short time during which the plea bargain was on the table – changes nothing. Indeed, it is a *non-sequitur*. The question is whether trial counsel had a duty to conduct at least a rudimentary investigation of the immigration

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[5]Saying Petitioner was "fully aware of potential immigration consequences" is at best tendentious, if not plainly false. He was aware that there *might* be immigration consequences, but it is undisputed that he did not know that he *would* be deported.

consequences and advise Petitioner accordingly – not whether it was possible for Petitioner to get that advice from some other source. As a matter of fact, it was *not* possible for him to get that advice when he needed it – that is, within however many minutes he was given to respond to the prosecution's "take-it-now-or-leave-it" offer.

If trial counsel had provided the effective assistance required by *Padilla*, Petitioner never would have been caught in that dilemma. Counsel *already* would have investigated the effect a drug conviction would have had on Petitioner's immigration status; it was absolutely sure to be an issue in regard to any possible negotiated disposition, and it was definitely implicated by the similar plea bargain counsel had herself proposed the day before, which would have had the same disastrous effect.[6]

The Court of Appeal insists that there was no ineffective assistance because Petitioner "made his choice" and took the deal without getting actual immigration advice – but it was an unfair and really impossible choice that he should not have had to make, and would not have been forced to make had his attorney done her job. By relieving trial counsel of the burden of investigation and advice outlined in *Padilla,* and instead placing it on the defendant himself, the Court of Appeal effectively short-circuited the entire concept of the "effective assistance of counsel" at issue in both *Padilla* and the case at bench.

In short, Petitioner did not receive the competent representation and advice to which he was indisputably entitled and so could not and did not enter an informed plea to the

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[6]It would have taken a matter of minutes for anyone trained in legal research to ascertain that a guilty plea to *any* drug offense would mean automatic, mandatory deportation. See, *Padilla*, 559 U.S. at 359 n.1. Indeed, counsel needed to do no more than to read *Padilla* itself to have that information.

offense. Absent relief from this Court, his resulting conviction will lead unavoidably to Petitioner's detention and ultimate expulsion from the United States.

B. The Lower Courts' Failure Properly To Assess Prejudice

The Court of Appeal's treatment of the second, or "prejudice" prong of the test for constitutionally ineffective counsel was similarly out of step with *Padilla*, and with this Court's precedent. When a claim of ineffective assistance of counsel "is raised in the context of a guilty plea, the prejudice prong requires the defendant to show 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty.'" *People v. Shokur*, 205 Cal. App. 4th 1398, 1407 (2012); quoting, *Hill v. Lockhart,* 474 U.S. 52, 58–59 (1989); *accord*, *People v. Superior Court (Zamudio)*, 23 Cal. 4th 183, 210 (2000). Thus, in concrete terms, "to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the circumstances." *Padilla*, 559 U.S. at 372 [citation omitted].[7]

There are several powerful reasons, which the Court of Appeal did not even acknowledge as such, why it would have been rational for Petitioner to reject the tendered bargain, and that strongly support the conclusion that there is at least a reasonable probability that he would not have done so, had he been properly advised.

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[7]Contrary to what the trial court assumed (see Exh. E at pp. 2-3), Petitioner is *not* required to show that he probably would have prevailed at trial. As the United States Court of Appeals for the Third Circuit summarized (overturning its own precedent, which had required a showing of likely acquittal): "The Supreme Court . . . requires only that a defendant have rationally gone to trial in the first place, and it has never required an affirmative demonstration of likely acquittal at such a trial as the *sine qua non* of prejudice." *United States v. Orocio*, 645 F.3d 630, 643-645 (3rd Cir. 2011).

The *first* is the fact that (although he did not know it) accepting the deal and entering the guilty plea absolutely guaranteed that Petitioner will be banished forever from the only home he has known as an adult – the country where he has lived for nearly two decades. It will also almost certainly mean that he will lose his license as a registered nurse, which he worked hard to earn and through which he has greatly benefitted the community. As the Supreme Court has reiterated, and this Court emphasized again in *Martinez*, "preserving [the] right to remain in the United States may be more important . . . than any potential jail sentence," to a noncitizen defendant, who "may view immigration consequences as the only ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges." *People v. Martinez*, 57 Cal. 4th at 563-64; quoting, *Padilla,* 559 U.S. at 364, 368. So it is in this case.

Second: There was very good reason for Petitioner to believe that he could have prevailed had the case been tried. The impetus for Mr. Patterson's arrest, and the glue that had held the prosecution's case together, was that he had so obviously appeared to be under the influence of some illegal substance as he careened down the road, failing to stop for the pursuing Highway Patrolman. His apparent intoxication not only made his "evading" the officer actionable – it mocked his assertion that he neither possessed nor knew the contents of the closed box, containing sample-size quantities of various drugs, found in his car.

But the appearances were deceiving, and the inferences that flowed from them were unsustainable. As the arresting Highway Patrol officer subsequently confirmed in his sworn affidavit, recounting what happened following Mr. Patterson's arrest:

"Due to the erratic behavior of the Defendant, both while driving and at the scene, he was transported to the Riverside Office and checked by a Drug Recognition Expert. The Drug Recognition Expert placed the Defendant under the influence of several different controlled substances. A blood test was obtained and submitted for testing. On October 3, 2011, a report was submitted of the blood results, *finding no controlled substances in the Defendant's blood*."

(Exh. C at 1 [emphasis supplied]).

At the same time, a completely exculpatory alternative explanation emerged: It turns out that Mr. Patterson suffers from hypoglycemia – something he did not know at the time, but learned shortly afterwards, when he suffered two more incidents, one of which resulted in a total loss of consciousness, serious injury and hospitalization. (CT:37; Exh. B). This was bolstered by the statements of hospital co-workers and others who know Mr. Patterson well, and could attest to his steadiness and sobriety (see CT:51-65), supporting his assertion that he had led a blameless life and had never even experimented with drugs. (CT:37). Finally, trial counsel was prepared to present evidence that the box of drugs had been left in his car by a passenger – a casual acquaintance named Fred Kluth – to whom Mr. Patterson had given a ride the last time he had driven the car. (CT:45-46). Absent evidence that Mr. Patterson was himself using those drugs, this explanation offered a perfectly plausible defense. *Cf. People v. Ramirez*, 141 Cal. App. 4th 1501, 1507 (2006)["""[T]he least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient cause to permit a change of plea from guilty to not guilty.""" (citations omitted)].

We are not proposing useless speculation as to whether Petitioner would have been

acquitted had he gone to trial – something it is *not* Petitioner's burden to prove. *United States v. Orocio*, 645 F.3d at 643, discussing *Padilla*; see also, *People v. Martinez*, 57 Cal.4th at 564. The point, rather, is that there is positive evidence demonstrating that the case was at least triable, and thus it would not have been irrational for Petitioner to take that chance if he had known that the alternative was to be banished from his home and stripped of his profession. *Cf.*, *In re Resendiz,* 25 Cal.4th 230, 254 (2001) [petitioner there failed to make out prejudice because "nothing in his declaration or the other evidence he offered indicates how he might have been able to avoid conviction or what specific defenses might have been available to him at trial."].

But he need not have gone to trial in any event. This brings up the *third* reason to conclude that it would have been rational for Petitioner not to accept the tendered plea bargain: It is undisputed that there was another, alternative plea bargain that would have satisfied the same prosecutorial objectives without incurring terrible immigration consequences. A guilty plea to "accessory after the fact" (Penal Code §32) to the identical drug possession offense (Health & Safety Code §11377(a)) would have carried the same legal weight and the same sentence– but without the terrible immigration results for Petitioner.[8] Especially in light of the evidence that the drugs belonged to a third party, there

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[8]See, *Matter of Batista-Hernandez* 21 I. & N. Dec. 955 (BIA 1997) [accessory after the fact to a drug-trafficking crime does not establish deportability as a drug-trafficking aggravated felony]; *Matter of Rivens*, 25 I&N Dec. 623 (BIA 2011) [being an "accessory" does not constitute a crime involving moral turpitude unless the principal's offense is itself a crime of moral turpitude.]; *Matter of Abreu-Semino*, 12 I. & N. Dec. 775 (BIA 1968) [personal-use controlled substances offenses are not considered crimes involving moral turpitude].

would have been no reasonable basis for either the District Attorney or the trial court to pose a principled objection to such an alternative plea.

The Court of Appeal (discussing the point in a different context) opined that it "does not find this premise convincing in this case wherein there is absolutely no evidence that the prosecutor and trial court would have been amenable to allowing defendant to plead guilty to a lesser charge." (Exh. A at 9). The assertion is demonstrably wrong, for two reasons. First, the alternative as posed would not involve a "lesser charge."[9] Second, there is ample evidence that the prosecutor and trial court would have been "amenable" to the alternative plea bargain, for (as shown above) it satisfied their legitimate interests, in terms of weight of the offense and sentencing range, exactly to the same extent and in the same way as the plea deal that was reached. Thus it would have been patently unreasonable for the prosecutor (or the trial court) to have rejected the alternative and insisted on trying a case that – as shown – posed serious problems for the prosecutor.

The Court of Appeal appears to suggest that Petitioner is required to bring in affirmative evidence, in the form of an admission by the prosecutor and the trial judge that they would have accepted the alternative disposition. But that is assuredly not the law. As the Supreme Court taught in *Strickland*, the test is whether a *reasonable* decision-maker would done so. *Strickland v. Washington*, 466 U.S. at 695 ["The assessment of prejudice

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[9] As noted, the proposed alternative would have carried exactly the same weight and involved the same sentencing range as the drug offense to which Petitioner pled guilty. As of July, 2011, when Petitioner was arrested, both violations of Health and Safety Code §11377(a) (to which he pled guilty) and of Penal Code §32 were felony / misdemeanor "wobblers;" if treated as a felony, each was punishable by a term of 16 months, 2 years or three years in the state prison. See, Pen. Code §§18 & 33; (former) H&S Code §11377(a).

should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency."] In this instance, a reasonable decisionmaker would surely have embraced the alternative plea bargain.

A *fourth* reason for crediting Petitioner's assertion, that he would have declined the plea bargain if he had known of its calamitous immigration consequences, is that he is now taking exactly the same risk by attempting to vacate his conviction. As the Supreme Court pointed out (and this Court reiterated): "'[A]n opportunity to withdraw the plea and proceed to trial imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. The challenge may result in a *less favorable* outcome for the defendant.'" *People v. Martinez*, 57 Cal.4th at 565; quoting, *Padilla v. Kentucky*, 559 U.S. at 372-73 [emphasis in the original; internal alterations omitted]. The fact that Petitioner is now courting every bit of the danger he faced when originally charged is itself strong evidence that he would have declined the plea bargain in the first place had he been aware of the havoc it would wreak in his life.

The Court of Appeal did not deign to address any of these factors in reaching its conclusion that Petitioner was "unable to show prejudice." Rather, its explanation was limited to two points. The first was that "a defendant's self-serving statement" regarding whether he would have accepted the proffered plea bargain "is insufficient in and of itself ... and must be corroborated by objective evidence." (Exh. A at 9, quoting, *In re Alvernaz*, 2 Cal.4th 924, 938 (1992)). Petitioner has no quarrel with that proposition, but it seems an

odd one to advance, given that the Court of Appeal steadfastly ignored the very persuasive "objective evidence" that was presented.

The only substantive point offered by the Court of Appeal was that Petitioner was "offered an advantageous bargain" with a light sentence, while he could have faced up to 10 years in prison if convicted of all of the original charges.[10] But that is, of course, true in the vast majority of cases challenging the validity of guilty pleas, if not in all of them. If that were sufficient, "in and of itself," to vitiate the prejudice arising from a plea entered without competent representation and necessary advice – a plea that, if allowed to stand, will have calamitous results for the petitioner – then there could never be a successful challenge to such judgments, and the constitutional right would never be vindicated.

C. The Denial of Petitioner's Motion to Withdraw His Plea Constituted an Abuse of Discretion

Once the constitutional imperative is correctly delineated, it becomes manifest that the trial court abused its discretion in denying Petitioner's motion to withdraw his plea pursuant to §1018.

Section 1018 provides, in pertinent part: "On application of the defendant at any time before judgment or within six months after an order granting probation is made if entry of judgment is suspended, the court may . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . *This section shall be liberally construed to effect these objects and to promote justice.*" (Emphasis supplied). The extent

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[10]We will not argue about the likelihood that Petitioner – a middle-aged nurse with absolutely no criminal record and sterling references in the community – would indeed have received such a draconian sentence if convicted of reckless driving and possessing very small quantities of various drugs.

of this liberality has frequently been reiterated as follows:

> """[T]he withdrawal of a plea of guilty should not be denied in any case where it is in the least evident that the ends of justice would be subserved by permitting the defendant to plead not guilty instead; and it has been held that the least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient cause to permit a change of plea from guilty to not guilty."""

People v. Ramirez, 141 Cal. App. 4th 1501, 1507 (2006) [citations omitted]. Thus, "[a]s a general rule, a plea of guilty may be withdrawn for 'mistake, ignorance or any other factor overreaching defendant's free and clear judgment.'" *People v. Johnson*, 47 Cal. 4th 668, 679 (2009).

It cannot be disputed that, in entering his plea, Petitioner was ignorant of the actual immigration catastrophe that would result. The lower courts nonetheless held that Petitioner had no cause for complaint on that score because he was advised, *per* §1016.5, of the *possibility* that the plea and resulting conviction *may* have various adverse immigration consequences. (See Exh. A at 13). In response to Petitioner's argument, based on *Padilla*, that he was constitutionally entitled to be advised by his lawyer of the *actual* consequences, both lower courts shrugged off the Supreme Court's opinion with the explanation that *Padilla* was an "misadvisement" case, and "[t]here was no misadvisement in this case." (*Ibid*).

As shown, *ante*, the lower courts were dead wrong in their parsimonious interpretation of *Padilla*. It follows that the decision denying Petitioner's §1018 motion was based on a flatly erroneous understanding of controlling law. Thus, although the denial of a §1018

motion is reviewed for "abuse of discretion," the trial court necessarily abused its discretion in this case because "'discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action.'" *Marriage of LaMusga*, 32 Cal.4th 1072, 1105 (2004) [citation omitted].

A correct interpretation of *Padilla* and its progeny compels the conclusion that Petitioner showed the "good cause" for withdrawing his plea, required under §1080. *Padilla* teaches that, given the new immigration law landscape, it is no longer enough for a noncitizen defendant to understand that a proposed plea *might* have some immigration consequences if, in fact, it *will* automatically result in his deportation. Although *Padilla* was directly concerned with the constitutional right to effective counsel, the courts that have considered the matter have held that exactly the same considerations support allowing a noncitizen defendant to withdraw his or her plea upon a showing that (a) the defendant is facing mandatory deportation as a result of the plea; (b) the defendant was unaware of that fact at the time of entering the plea; and (c) the defendant would not have agreed to the plea bargain had she or he known. See, *United States v. Urias-Marrufo*, 744 F.3d 361, 368-69 (5th Cir. 2014) [rejecting conclusion that *Padilla* "applied only to habeas claims for ineffective assistance of counsel . . . and not in the context of the withdrawal of a guilty plea."]; *United States v. Bonilla*, 637 F.3d at 984; *Commonwealth v. DeJesus*, 9 N.E.2d 789; *State v. Kostyuchenko*, 2014 Ohio 324, 2014 Ohio App. LEXIS 309, 9-13 (Ohio Ct. App. 2014) [defendant permitted to withdraw plea where "the plea form and the [statutory] advisement, because they informed Kostyuchenko only that he 'may' be deported, did not provide the degree of 'accuracy' concerning immigration consequences that *Padilla* demands

when, as here, federal immigration law plainly mandates deportation."]; *State v. Yuma*, 286 Neb. 244, 835 N.W.2d 679 (Neb. 2013); *Rabess v. State*, 115 So.3d 1079, 1080-1081 (Fla. Ct. App. 2013) ["Here, the trial court denied appellant's claim based on the 'may' warning given during the colloquy. The law is now clear that the 'may' warning is not alone sufficient to refute the claim where the deportation consequence is truly clear and automatic from the face of the immigration statute."]; *Campos v. State*, 798 N.W.2d 565, 567 (Minn. Ct. App. 2011); *see also, State v. Nunez-Valdez*, 200 N.J. 129, 143, 975 A.2d 418, 426 (N.J. 2009) [plea was not knowing and voluntary because defendant was unaware of the mandatory deportation consequences; defendant could withdraw plea even though he had been advised of possibility of deportation, and had signed form so stating].

The Court should grant review to ensure that the lower courts of California understand and are in alignment with the teaching of *Padilla v. Kentucky*, and are applying it in conformity with other state and federal jurisdictions throughout the country to the question of whether noncitizen defendants should be permitted to withdraw guilty pleas that – unknown to the defendants – entail ruinous immigration consequences.

CONCLUSION

For the reasons stated above, the Court should grant review to resolve these important issues of law; to resolve the conflict in the lower courts; and to clarify the application of binding constitutional precedent to cases involving guilty pleas taken from noncitizen defendants.

Dated: March 19, 2015

Respectfully submitted,

AJ KUTCHINS
Attorney for Petitioner Ron Douglas Patterson

CERTIFICATION REGARDING LENGTH OF PETITION

Undersigned counsel hereby certifies that the attached Petition for Review contains 8,359 words, exclusive of tables, appendices and caption.

Dated: March 19, 2015

AJ Kutchins

PROOF OF SERVICE BY MAIL

I am a citizen of the United States. I am over the age of 18 and not a party to the within action; my business address is P.O. Box 5138, Berkeley, California 94705.

On March 19, 2015, I served the enclosed Petition for Review in the action entitled *In re Ron Douglas Patterson,* Supreme Court No. ______ (Fourth Dist. No. E061436), on the parties, by placing it in a sealed envelope with postage thereon fully prepaid, in the United States mail at Berkeley, California, addressed as follows:

Mr. Kevin J. Lane, Clerk/Administrator
California Court of Appeal
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA 92501

Megan J. Beale
California Deputy Attorney General
110 West A Street, Ste. 1100
San Diego, California 92101

Hon. Helios J. Hernandez
Riverside County Superior Court
4100 Main Street
Riverside, California 92501

District Attorney, Riverside County
3960 Orange Street
Riverside, CA 92501

Ryan Patterson
5285 E. Waverly Drive, Unit 114
Palm Springs, CA 92264

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 19, 2015, at Berkeley, California.

____
AJ Kutchins

PROOF OF SERVICE BY MAIL

I am a citizen of the United States. I am over the age of 18 and not a party to the within action; my business address is P.O. Box 5138, Berkeley, California 94705.

On March 19, 2015, I served the enclosed Petition for Review in the action entitled *People of the State of California vs. Ron Douglas Patterson,* Supreme Court No. ______ (Fourth Dist. No. E060758), on the parties, by placing it in a sealed envelope with postage thereon fully prepaid, in the United States mail at Berkeley, California, addressed as follows:

Mr. Kevin J. Lane, Clerk/Administrator
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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 19, 2015, at Berkeley, California.

AJ Kutchins

EXHIBIT A

Court of Appeal Opinion re Habeas Petition and Direct Appeal

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

Court of Appeal
Fourth Appellate District
Division Two
ELECTRONICALLY FILED

1:27 pm, Mar 09, 2015

By: M. Parlapiano

THE PEOPLE,

Plaintiff and Respondent,

v.

RON DOUGLAS PATTERSON,

Defendant and Appellant.

E060758

(Super.Ct.No. RIF1201642)

OPINION

APPEAL from the Superior Court of Riverside County. Helios (Joe) Hernandez, Judge. Affirmed.

AJ Kutchins for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood, Heather Crawford and Meagan J. Beale, Deputy Attorneys General, for Plaintiff and Respondent.

On October 22, 2012, an amended felony complaint charged defendant and appellant Ron Douglas Patterson with reckless evasion of a police officer under Vehicle Code section 2800.2 (count 1); transportation or sale of methamphetamine under Health and Safety Code section 11379, subdivision (a) (counts 2, 7); transportation or sale of cocaine under Health and Safety Code section 11352, subdivision (a) (count 3); possession of cocaine under Health and Safety Code section 11350, subdivision (a) (count 4); possession of morphine under Health and Safety Code section 11350, subdivision (a) (count 5); possession of MDMA under Health and Safety Code section 11377, subdivision (a) (count 6); and possession of PCP under Health and Safety code section 11377 (count 8).

On March 13, 2013, defendant entered into a plea agreement wherein he agreed to plead no contest to counts 1 and 6. In exchange, defendant would be granted probation with the condition that he serve 180 days in custody on weekends or work release. The remaining counts were dismissed. The trial court sentenced defendant in accordance with the plea agreement.

On January 8, 2014, the trial court denied defendant's motion to withdraw his plea. Defendant filed a notice of appeal and the trial court granted a certificate of probable cause. On appeal, defendant contends that the trial court abused its discretion when it denied his motion to withdraw the plea. Moreover, on July 1, 2014, defendant filed a petition for writ of habeas corpus, case No. E061436. On July 8, 2014, we ordered that the petition for writ of habeas corpus would be considered with this appeal for the sole purpose of determining whether an order to show cause should issue. For the

reasons set forth below, we shall affirm the judgment and summarily deny the petition for writ of habeas corpus.

FACTUAL AND PROCEDURAL HISTORY

Defendant agreed that he committed the crimes of reckless evasion of a police officer and possession of MDMA. On July 19, 2011, defendant did not stop his car when the police were pursuing him with the siren and lights activated on the police vehicle. Defendant caused a collision with the car of an 80-year-old woman. Defendant possessed a controlled substance.

DISCUSSION

A. THE WRIT OF HABEAS CORPUS

In his petition for a writ of habeas corpus, defendant asserts that his trial counsel provided him with ineffective assistance of counsel (IAC). Defendant seeks reversal of the judgment and the setting aside of his guilty plea. The People have filed an informal response to defendant's writ petition, and defendant has filed a reply.

Defendant bears the burden of proof of pleading a sufficient basis for writ relief: "Because a petition for a writ of habeas corpus seeks to collaterally attack a presumptively final criminal judgment, the petitioner bears a heavy burden initially to *plead* sufficient grounds for relief, and then later to *prove* them. 'For purposes of collateral attack, all presumptions favor the truth, accuracy, and fairness of the conviction and sentence; *defendant* thus must undertake the burden of overturning them. Society's interest in the finality of criminal proceedings so demands, and due process is not thereby offended.' [Citation.]" (*People v. Duvall* (1995) 9 Cal.4th 464, 474.)

Defendant asserts in his writ petition that he is entitled to an order vacating the plea agreement and his guilty plea based on ineffective representation provided by his trial counsel prior to defendant entering his guilty plea. Defendant alleges he was prejudiced by counsel's IAC in that defendant would not have pled guilty had counsel provided effective representation. Defendant complains that his defense counsel was ineffective because she failed to advise him that his conviction would absolutely result in his permanent deportation and loss of his nursing license, and she did not attempt to negotiate a plea to an alternative, immigration-neutral offense.

In order to prevail on a claim of IAC, the defendant must show both that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694; see also *In re Resendiz* (2001) 25 Cal.4th 230, 237, 239 (*Resendiz*).) A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. (*People v. Bolin* (1998) 18 Cal.4th 297, 333.) If a claim of IAC can be determined on the ground of lack of prejudice, a court need not decide whether counsel's performance was deficient. (*Strickland*, at p. 697; *In re Cox* (2003) 30 Cal.4th 974, 1019-1020.)

In this case, defendant has failed to demonstrate either incompetence or prejudice. Here, in his felony plea form, defendant initialed next to the following: "If I am not a citizen of the United States, I understand that this conviction may have the consequences of deportation, exclusion from admission to the United Sates, or denial of naturalization

pursuant to the laws of the United States." At the hearing wherein defendant pled no contest, defendant stated that he went over the plea forms with counsel, understood everything, and did not have any questions. In his declaration in support of his motion to withdraw his guilty plea, defendant admits that "[t]he plea form, in the fine print, said there might be immigration consequences." Defendant, however, states that he did not know that the conviction would make his deportation mandatory. Defendant even admits that he tried to get in touch with his immigration lawyer but decided to take the offer without immigration advice "since [he] was informed that the offer would be withdrawn if not accepted at that time." Defendant made a calculated decision to take the plea – knowing there could be immigration consequences – without first consulting with his immigration counsel. Based on the above, we cannot say that defense counsel acted incompetently. Instead, counsel ensured that defendant knew about potential immigration consequences.

Defendant argues that the advisement he admittedly received, couched in the statutory language, was inadequate. He contends that his attorney was obliged to do more than advise him of the general consequences of the plea, in reliance on cases such as *Padilla v. Kentucky* (2010) 559 U.S. 356 (*Padilla*); *Resendiz, supra*, 25 Cal.4th 230. These cases do not support his IAC claim.

In *Padilla*, the United States Supreme Court simply held that "counsel must inform her client whether his plea carries a risk of deportation," and found that the defendant's counsel was deficient for failing to do so. (*Padilla, supra*, 559 U.S. at pp. 373-374.) However, counsel in that case not only failed to advise the defendant of

immigration consequences prior to entering his plea, but also told him that he "did not have to worry" about his immigration status, since he had been in the United Stated for so long. (*Id.* at p. 359.) The United States Supreme Court found defense counsel's performance deficient. Although the consequences of the defendant's plea could have easily been determined from reading the applicable statute, counsel failed to advise the defendant in accordance with the statute. Furthermore, his counsel's advice was incorrect. (*Id.* at pp. 368-369.) The court stated: "It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the 'mercies of incompetent counsel.' [Citation.] To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a *risk* of deportation." (*Id.* at p. 374, italics added.)

Similarly, defense counsel in *Resendiz* affirmatively misadvised the defendant by telling him that if he pled guilty, he would have "'no problems with immigration' except that he would not be able to become a United States citizen." (*Resendiz*, *supra*, 25 Cal.4th at pp. 236, 251.)

Here, defendant does not and cannot claim that his attorney gave him incorrect advice. The evidence clearly shows that defendant was aware of potential immigration consequences.

Defendant relies on *People v. Soriano* (1987) 194 Cal.App.3d 1470, for the proposition that his attorney was obliged to do more than tell him the immigration consequences of the plea in general terms. (See *Id.* at pp. 1480-1482 [a "formulaic warning" or a "pro forma caution" from the attorney was not "founded on adequate

investigation of federal immigration law," and was inadequate advice concerning the immigration consequences of the plea].) On the other hand, the California Supreme Court in *Resendiz* stated that the failure of the trial attorney to investigate the likely immigration consequences did not constitute deficient performance: "We are not persuaded that the Sixth Amendment imposes a blanket obligation on defense counsel, when advising pleading defendants, to investigate immigration consequences or research immigration law." (*Resendiz, supra*, 25 Cal.4th at pp. 249-250.) We are likewise unpersuaded that an attorney has a duty to do more than advise the pleading defendant of the immigration consequences of the plea; no particular form of warning is required, as long as the defendant is informed that serious immigration consequences could result from the conviction. (Cf. *People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1244 [statutory admonition by the court under Pen. Code, § 1016.5 "need not be in the statutory language, and substantial compliance is all that is required, 'as long as the defendant is specifically advised of all three separate immigration consequences of his plea'"].)

At oral argument, defendant's appellate counsel argued that trial counsel rendered IAC because she failed to inform defendant that pleading guilty would lead to deportation, citing *Padilla, supra*, 559 U.S. 356. As we have discussed above, we find counsel's argument to be without merit. In *Padilla*, defense counsel affirmatively told the defendant that he did not have to worry about his immigration consequences. Here, defendant was informed about immigration consequences. However, defendant's appellate counsel argued that notwithstanding defense counsel's advisement, she still

rendered IAC because she failed to inform defendant that he *would* be deported; Arguing *Padilla* is not limited to instances of affirmative misadvice.

In *Padilla*, 559 U.S. 356, the Supreme Court was worried that limiting its holding "to affirmative misadvice would invite two absurd results." (*Id.* at p. 370.) "First, it would give counsel an incentive to remain silent on matters of great importance . . . Second, it would deny a class of clients least able to represent themselves the most rudimentary advice on deportation even when it is readily available." (*Id.* at pp. 370-371.) In this case, defense counsel did not remain silent; she informed defendant of potential immigration consequences if he pled guilty. Not only did counsel inform defendant that he may risk deportation, defendant had hired an immigration attorney to advise him separately on this issue. Defendant, however, made a calculated decision to enter the plea prior to consulting with his immigration attorney because he did not want to risk losing the plea deal. Under these circumstance, where defendant made his choice to go forward with his plea deal fully aware of potential immigration consequences and with the ability to figure out the *exact* immigration ramifications, he cannot now claim IAC in an effort to vacate his plea.

Defendant also relies on *People v. Bautista* (2004) 115 Cal.App.4th 229. In *Bautista*, the defendant was arrested after investigators found 100 pounds of marijuana in a storage locker he was renting with his brother. (*Id.* at pp. 232-234.) The *Bautista* court found ineffective assistance of counsel because the defendant's attorney did not attempt to plead up to a lesser offense that was not an aggravated felony under federal immigration law. (*Id.* at pp. 239-242.) Because the defendant was a co-renter of the

storage unit, had no past convictions, did not personally possess contraband or weapons, and no weapons were used in the crime, the court in *Bautista* described the defendant's offense as "relatively innocuous." (*Id.* at p. 242.)

We do not find *Bautista* persuasive because its entire analysis is predicated on the premise that there was a reasonable probability the prosecutor and trial court would have been amenable to allowing the defendant to plead up to a nonaggravated felony. We do not find this premise convincing in this case wherein there is absolutely no evidence that the prosecutor and trial court would have been amenable to allowing defendant to plead guilty to a lesser charge.

Just as defendant is unable to establish that his attorneys acted incompetently, he is also unable to show prejudice. Despite defendant's averment in his declaration—that he would not have pleaded guilty had he known that he could be deported—that claim is not sufficient in itself to establish prejudice. "[A] defendant's self-serving statement [regarding whether] with competent advice he or she *would* [or would not] have accepted a proffered plea bargain, is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims." (*In re Alvernaz* (1992) 2 Cal.4th 924, 938.) The factors to consider are, "whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain." (*Ibid.*)

Defendant has not claimed that trial counsel inaccurately conveyed the plea offer to him. He was offered an advantageous bargain, resulting in dismissal of six charges and a limitation of custody to weekend or work release incarceration. Although defendant asserts he would have insisted on going to trial had he known he could be deported, at trial his exposure was 10 years imprisonment had he been convicted, and the conviction still would have rendered him deportable.

Defendant could not establish either prong of his IAC claim; the claim fails.[1]

B. THE APPEAL: MOTION TO VACATE PLEA

The People contend that the trial court erred in granting defendant's motion to withdraw his guilty plea and reinstating the criminal proceedings.

"Penal Code section 1018 provides that a trial court 'must' allow the withdrawal of a guilty plea only in the case of a defendant who entered a guilty plea without counsel, and in other cases the court 'may . . . for good cause shown, permit a plea of guilty to be withdrawn . . . .'" (*People v. Watts* (1977) 67 Cal.App.3d 173, 184; see *People v. Cruz* (1974) 12 Cal.3d 562, 565-566.) Good cause is shown by mistake, ignorance, inadvertence, or "'any other factor overreaching defendant's free and clear judgment,'" and the defendant has the burden of showing good cause by clear and convincing evidence. (*People v. Superior Court* (*Giron*) (1974) 11 Cal.3d 793, 797; *Cruz*, at p. 566.) The trial court then considers all factors necessary to obtain a just result, including the rights of the defendant. (*Giron*, at p. 798; *People v. Waters* (1975) 52 Cal App.3d 323,

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[1] We dispose of the writ by way of a separate order.

331.) The trial court must examine whether the defendant understood the nature of the charges, the elements of the offense, the pleas and the defenses at the time of his plea. (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103.)

"A decision to deny a motion to withdraw a guilty plea '"rests in the sound discretion of the trial court"' and is final unless the defendant can show a clear abuse of that discretion." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) The trial court has broad discretion when considering a motion to withdraw a guilty plea, and the facts found by the trial court must be adopted by the reviewing court if they are supported by substantial evidence. (*People v. Suon* (1999) 76 Cal.App.4th 1, 4; *People v. Mickens* (1995) 38 Cal.App.4th 1557, 1561.) Therefore, the trial court's denial must be "arbitrary or capricious or '"'exceed[] the bounds of reason[,]'"'" to be disturbed on appeal.[2] (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1121.)

In this case, defendant claims that he is entitled to withdraw his no contest plea because he was unaware that "his resulting conviction would have the automatic and unavoidable effect" of deportation. We disagree.

Here, as provided above, defendant initialed and signed the plea form wherein under "CONSEQUENCES OF PLEA," it stated: "If I am not a citizen of the United States, I understand that this conviction may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the

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[2] The reviewing court must also take into account that "guilty pleas entered as a result of a bargain should not be lightly set aside and . . . the finality of such proceedings should be encouraged." (*People v. Urfer* (1979) 94 Cal.App.3d 887, 893, fn. 6, citing *Blackledge v. Allison* (1977) 431 U.S. 63.)

laws of the United States." Defendant initialed next to a line immediately next to this statement. Moreover, defendant signed immediately below the statement, "I have read and understand this entire document. I waive and give up all of the rights that I have initialed. I accept this Plea Agreement." Thereafter, defense counsel dated and signed immediately below this statement: "I am the attorney for the defendant. I am satisfied that (1) the defendant understands his/her constitutional rights and understands that a guilty plea would be a waiver of these rights; (2) the defendant has had an adequate opportunity to discuss his/her case with me, including any defenses he/she may have to the charges; and (3) the defendant understands the consequences of his/her guilty plea. I join in the decision of the defendant to enter a guilty plea."

Moreover, in his declaration in support of his motion to withdraw his plea, defendant admits that he knew about the immigration consequences of his guilty plea. Defendant tried to contact his immigration attorney but was not successful. However, although defendant was not clear what those consequences may be, *he decided to take the plea offer*.

At the hearing on the motion to withdraw, the court pointed out, "This is a case where [defendant] hired a private attorney, and there was substantial amount of negotiation between the defense attorney and DA. The defense attorney actually wrote a letter, very laudatory of [defendant] about his life as a Canadian and how he has a productive second life in the United States. So I don't think there's any misunderstanding about the facts." The court went on to note that defendant signed the plea agreement indicating that he knew about potential deportation consequences. The

court concluded by stating: "I think 1016.5 is here for a purpose, and it was given. [Defendant] said he understood everything I asked him. It says, 'Do you understand everything?' 'Do you have any questions?' He said 'yes' he understood. 'No,' he didn't have any questions. There's a point where you have to treat an adult as an adult and just accept their answers for what they are." Thereafter, the court denied defendant's motion.

In sum, based on the plea form and defendant's own admissions, it is unequivocal that defendant received the required admonition under Penal Code section 1016.5 and clearly knew about the immigration consequences. The trial court, therefore, did not abuse its discretion in denying defendant's motion to withdraw his guilty plea.

Defendant, however, argues that his motion to withdraw should have been granted under *Padilla v. Kentucky, supra*, 559 U.S. 356. However, as discussed *ante*, in *Padilla*, defense counsel gave incorrect advice to her noncitizen client by advising him that a guilty plea would have no consequences for the defendant's immigration status. (*Id.* at p. 359.) There was no misadvisement in this case. Instead, defendant was fully aware of the immigration consequences.

Moreover, defendant's reliance on *United States v. Bonilla* (9th. Cir. 2011) 637 F.3d 980 is misleading. Defendant repeatedly quotes the following from *Bonilla*: "A criminal defendant who faces almost certain deportation is entitled to know more than that it is *possible* that a guilty plea could lead to removal; he is entitled to know that it is a virtual certainty." (*Id.* at p. 984.) *Bonilla*, however, is distinguishable.

In that case, the defendant's wife, on behalf of the defendant, repeatedly asked the investigator at the public defender's office and the public defender if the defendant could

be deported if he pled guilty. (*United States v. Bonilla*, *supra*, 637 F.3d. at pp. 981-982.) Although the public defender told the defendant's wife that she would look into the matter, the public defender never did "and failed to provide any information about immigration consequences to [the defendant] or [the defendant's] wife prior to the plea hearing." (*Id.* at p. 982.) Even after the defendant entered his guilty plea, the wife again asked the lawyer about the immigration consequences of his plea. The lawyer told the wife an answer would be provided after talking with an immigration specialist. "Several days later, she told [the defendant's] wife over the phone that as a result of his guilty plea, [the defendant] would be deported after serving his sentence." (*Ibid.*) Therefore, the defendant filed his motion to withdraw, which the district court denied. The Ninth Circuit reversed the district court. In reaching this decision, the Ninth Circuit noted that the defendant "received *no* advice about immigration consequences before entering his plea, only learning afterward that pleading guilty would almost certainly result in deportation." (*Id.* at p. 984.) The court also stated that although the defendant "may have known prior to his plea about the *possibility* that there might be a reason not to plead to the indictment, because of [the defendant's] lawyer's failure to answer his wife's question he did not know whether that possibility was likely to have any real consequences." (*Id.* at p. 985.) Moreover, the defendant's lawyer "later admitted that at the time of the plea hearing she had mistakenly thought that [the defendant] was a citizen." (*Id.* at p. 986.) Therefore, the court concluded: "Had [the defendant's] lawyer provided him with the advice that his wife requested about possible immigration consequences of his plea, such advice 'could have at least plausibly motivated a

reasonable person in [the defendant's] position not to have pled guilty. . . .' [Citation.]" (*Ibid.*)

The facts in this case are different. Here, unlike the defendant and his wife in *Bonilla*—who repeatedly requested information regarding immigration consequences and were never told about them—defendant was informed and acknowledges that he was informed regarding the possible immigration consequences. *Bonilla*, therefore, is not applicable.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER
J.

We concur:

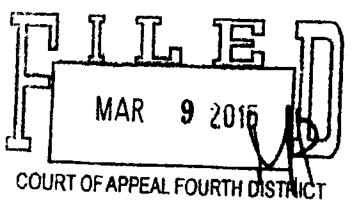
RAMIREZ
P. J.

McKINSTER
J.

EXHIBIT B

Court of Appeal Order Denying Habeas Petition

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION TWO



ORDER

In re RON DOUGLAS PATTERSON on Habeas Corpus.	E061436 (Super.Ct.No. RIF1201642) The County of Riverside

THE COURT

The petition for writ of habeas corpus is DENIED.

Acting P. J.

cc: See attached list

MAILING LIST FOR CASE: E061436
In re Ron Patterson on Habeas Corpus

Superior Court Clerk
Riverside County
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EXHIBIT C

Declaration of Officer Robert West

SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF RIVERSIDE

RECEIVED MAY 01 2012

People of the State of California	)	Case #: F253-840-11 RIF1201642
v.	)	**DECLARATION IN SUPPORT OF ARREST WARRANT**
Ron Douglas Patterson	)	

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE
MAY 21 2012
MAY 21 2012

The undersigned, Robert West #15013, declares he is an officer with the California Highway Patrol.

On July 19, 2011 at approximately 2:23 PM, I was on patrol, on SR-60, when I monitored a radio broadcast from CHP dispatch of a vehicle traveling westbound on SR-60 approaching my location. The broadcast was of a reckless vehicle with a possible intoxicated driver. I stood by on the right shoulder, westbound on SR-60 west of Valley Way and eventually observed the Defendant's vehicle weaving badly between the car pool lane and the west #1 lane, approaching my location. I positioned my patrol vehicle behind the Defendant's vehicle and activated my fully marked Highway Patrol vehicle's overhead lights. The defendant was driving very erratic and it appeared as if the driver were intoxicated. When I realized that the driver was not going to yield to my lights, I activated my patrol vehicles audible siren. I informed CHP dispatch that the vehicle was not yielding. I continued to pursue the Defendant's vehicle westbound, while the Defendant used all lanes of traffic and the right shoulder. I was forced to keep traffic back due to the Defendant's reckless manner of driving. The Defendant drove his vehicle off of the roadway onto the dirt shoulder, just prior to exiting the freeway at Pedley Rd. The Defendant ran a posted stop sign at the top of the off-ramp and then ran a second stop sign at the intersection of Pedley Rd. and Granite Hill Dr. The Defendant drove his vehicle into the westbound lane on Granite Hill, while traveling eastbound and side swiped a vehicle that was traveling westbound. The Defendant continued to flee, leaving the scene of the collision. I big-rig tractor trailer traveling eastbound on Granite Hill Dr. slowed the Defendant's vehicle and the Defendant came to a stop on the dirt shoulder, approximately a quarter of a mile east of the collision scene. I was able to take the Defendant out of the vehicle at gun point and affect an arrest. Fire/Rescue was called to the scene and the Defendant was tested at the scene for possible low blood suger and the test was negative. During an inventory of the Defendant's vehicle a tin container was located on the right front seat. Inside the container were several small baggies. The baggies contained cocaine, Morphine pills, Ecstasy pills, Methamphetamine, and possibly PCP as tested by drug test kits (NIK). Due to the erratic behavior of the Defendant, both while driving and at the scene, he was transported to the Riverside Office and checked by a Drug Recognition Expert. The Drug Recognition Expert placed the Defendant under the influence of several different controlled substances. A blood test was obtained and submitted for testing. On October 3, 2011, a report was submitted of the blood results, finding no controlled substances in the Defendant's blood. The Defendant was identified by his valid California driver

license and all evidence was properly booked. The Defendant was booked in Riverside County under multiple charges including, 2800.2(a) CVC-Evading arrest, 11377(a) H&S-Possession, 20002(a) CVC-Hit and Run, 2800.4 CVC-Evading arrest (driving wrong way) and 11350 H&S. The Defendant was also booked for 11550 H&S and 23152(a) CVC, which are charges that are no longer being sought.

This event involved a CHP vehicle equipped with an MVARS (Mobil Video Audio Recording System), which was activated during the event and which, may or may not have captured all information relevant to the event. The recording is maintained at the CHP Office, where the Officer is assigned. There is one disk (MVARS) DVD available.

Based on the aforementioned, I believe the Defendant (Patterson) violated the following sections: 2800.2(a) CVC, 11377(a) H&S, 11350 H&S, 2800.4 CVC, 20002(a) CVC and 16028(c) CVC.

I pray an arrest warrant be issued for the arrest, during day or night, for Ron D. Patterson

LAW ENFORCEMENT:	JUDICIAL OFFICER:
I declare, under penalty of perjury under the laws of the State of California, the foregoing is true and correct.	✓ Approved ____ Disapproved
Date: 11/12/2011	Bail: $30,000 Date: 5/20/2012
[signature] Signature	[signature] Signature
ROBERT E. WEST Print Name	[illegible] Print Name

EXHIBIT D

Declaration of Norton Tooby, Esq.

DECLARATION OF NORTON TOOBY, ESQ.

I, NORTON TOOBY, declare:

1. *Background of Declarant.* I am now, and have been for over 40 years, an attorney duly licensed to practice law before the state courts in California. I am now admitted to practice as well, before the United States Supreme Court, the Ninth Circuit Court of Appeals, and various federal district courts. My offices are at 2831 Telegraph Avenue, Oakland, California 94609. My specialty has always been criminal defense, and since 1986 I have increasingly emphasized criminal defense of immigrants. That is now virtually all I do, and I have carried my study of this field to the point of writing a number of practice manuals, and teaching seminars for attorneys, in the areas of criminal defense of immigrants and the immigration consequences of criminal cases. In particular, I have written or coauthored *Criminal Defense of Immigrants* (4th ed. 2007), *Tooby's Crimes of Moral Turpitude* (2008), *Aggravated Felonies* (2d ed. 2008), *Tooby's Guide to Criminal Immigration Law* (2008), *Safe Havens: How to Identify and Construct Non-Deportable Convictions* (2005), and served as Update Editor of *Immigration Law and Crimes* (West Group) during the five years from 1998-2002. In partnership with the Immigrant Legal Resource Center and others, I have given one-day seminars for immigration and criminal lawyers in California and nationally at least once per year for about the last 20 years.

2. *Investigation.* I was retained by Ryan Patterson to evaluate the viability of seeking post-conviction relief to vacate his Riverside County Superior Court conviction by plea of guilty in Case No. RIF1201642 on March 13, 2013, to Count I, evading an officer, in violation of Vehicle Code § 2800.2(a), and Count VI, possession of a controlled substance, in violation of Health & Safety Code § 11377(a), for which he was on that date sentenced to three years probation, on condition of serving 180 days incarceration, on work release. I have examined the court file and defense counsel's file, conducted legal research, and interviewed defense counsel Tera Harden, Esq., by telephone on May 12, 2014, after some initial unsuccessful efforts.

3. *Immigration Consequences of Plea to Possession of a Controlled Substance.* The immigration consequences of Mr. Patterson's plea in this case to possession of a controlled substance, in violation of Health & Safety Code § 11377(a), constitutes a controlled substances conviction, under 8 U.S.C. § 1227(a)(2)(B)(i), which triggers deportation and inadmissibility, for which there is no possibility of discretionary relief from deportation under 8 U.S.C. § 1229b(a), for a number of reasons. The chances that this conviction will trigger actual deportation and inadmissibility are therefore 100%. It is not true that this plea "may result" in these adverse immigration consequences. This plea *will in fact* result in these consequences.[1] Also as a result of this plea, he will be subject to mandatory immigration detention without bond, during deportation proceedings. These adverse immigration consequences are clearly apparent on the face of the immigration statutes cited, and are exactly the same as the immigration consequences the U.S. Supreme Court found to be clear in *Padilla*, *infra*, so as to require defense counsel to warn the defendant of them at the time of plea.

4. *Defense Counsel's Statement.* On May 12, 2014, by telephone, I spoke to Tera Hardin, Esq., who represented Mr. Patterson during plea bargaining and entry of the plea and sentence in this case. She willingly answered my questions, but when I asked whether she would be willing to sign a declaration, she stated repeatedly that she would prefer to be subpoenaed to testify, so the court could resolve any objection based on attorney-client privilege before she revealed confidential attorney-client information to the court and prosecution. I am therefore offering the court the pertinent information from her statements to me on the issue of whether she complied with counsel's obligation under *People v. Soriano* (1987) 194 Cal.App.3d 1470, 240 Cal.Rptr. 328 and *Padilla v. Kentucky*, 559 U.S. 356 (2010) to investigate the defendant's immigration status, research the actual immigration consequences of the plea, and inform him of them prior to plea. In

[1] It was previously the law that a plea to possession of a controlled substance, followed by a deferred entry of judgment dismissal, under Penal Code § 1000, would under certain circumstances eliminate the conviction for immigration purposes. Unfortunately, this favorable rule was reversed, and did not apply to Mr. Patterson's 2013 plea. *Nunez-Reyes v Holder* (9th Cir July 14, 2011) 646 F3d 684 (en banc).

addition, this information is offered on the issue whether she rendered deficient performance by failing to investigate and propose an alternative plea to the possession count that would not trigger these adverse immigration consequences, as required by *People v. Bautista* (2004) 115 Cal.App.4th 229, 8 Cal.Rptr.3d 862.

5. *Defense Counsel's Settlement Letter*. On March 12, 2013, defense counsel authored a settlement letter to the deputy district attorney concerning Mr. Patterson's case, informing her of many favorable aspects of his case, and proposing, *inter alia*, that Mr. Patterson enter a plea to two counts of possession of a controlled substance, under Health & Safety Code § 11377(a), and receive a sentence on those counts of Deferred Entry of Judgment, under Penal Code § 1000. A true and correct copy of this letter, and its attachments, is attached hereto as I received it directly from Ms. Harden during my investigation of this case. The immigration consequences of the plea to two counts of possession she offered, in this letter, are identical to those of the plea to one count of a violation of the same statute, Health & Safety Code § 11377(a), that he actually entered the next day, on March 13, 2013. To repeat, those consequences are mandatory deportation, mandatory inadmissibility, mandatory detention, and disqualification from eligibility for discretionary relief from removal, as outlined in Paragraph 3, *supra*.

6. *Defense Counsel's Advice to Mr. Patterson*. She informed me that before plea, she had advised Mr. Patterson repeatedly concerning the potential immigration consequences of the plea he proposed and entered by reading him the warning contained in Penal Code § 1016.5(a), that "any plea" may result in deportation, denial of readmission into the United States, or denial of naturalization. She did not perform any investigation or research into the actual (as opposed to potential) immigration consequences for Mr. Patterson in particular, or of this plea to possession of a controlled substance, in violation of Health & Safety Code § 11377(a) in particular, and did not advise him of them. Instead of advising him on the actual immigration consequences of the specific plea, she advised him to seek immigration counsel.

7. *Opinion on Ineffective Assistance of Counsel.* In my opinion, defense counsel's performance was deficient, in violation of *People v. Soriano, supra*, *People v. Bautista, supra*, and *Padilla v. Kentucky, supra*, in that:

(a) She failed to investigate the actual adverse immigration consequences of the plea she proposed to two counts of possession of a controlled substance;

(b) She failed affirmatively to advise her client of the actual adverse immigration consequences of the plea she proposed to two counts of possession of a controlled substance;

(c) She failed to discover an alternative immigration-neutral disposition, that would be equivalent in seriousness and actual sentence to the controlled substances plea actually entered, and failed to propose that alternative disposition to the prosecution; and

(d) She failed in the same three ways with respect to the plea to a single count of violation of the same statute that Mr. Patterson in fact entered in this case.

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on May 20, 2014, at Oakland, California.

NORTON TOOBY, Esq.

EXHIBIT E

Trial Court "Order re Petition for Writ of Habeas Corpus"

FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF RIVERSIDE

MAY 29 2014

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE

In the Matter of the Petition of Ron Douglas Patterson For a Writ of Habeas Corpus	Habeas Case #: RIC 1405317 Riverside Case #: 1201642 ORDER RE PETITION FOR WRIT OF HABEAS CORPUS

The Court, having read and considered the Petition for Writ of Habeas Corpus filed May 23, 2014, hereby denies said petition as follows:

A. DENIALS

1. ______ The petition is denied because the petition fails to state a prima facie factual case supporting the petitioner's release. (Cal. Rules of Court, rule 4.551(c).) The petition makes assertions regarding the applicable law that are contrary to established California case decisions.

2. XXXXX The petition is denied because the petition fails to state a prima facie factual case supporting the petitioner's release. (Cal. Rules of Court, rule 4.551(c).) While the petition states a number of factual conclusions, these broad conclusions are not backed up with specific details and/or are not supported by the record in the case.

3. ______ The petition is denied with prejudice because the issues raised in the petition were raised and considered in a prior appeal. "[I]ssues resolved on appeal will not be reconsidered on habeas corpus . . . ." (*In re Clark* (1993) 5 Cal.4th 750, 765.)

4. ______ The petition is denied because the petition fails to raise any new issue that has not previously been addressed in an earlier writ petition. "[A]bsent a change in the applicable law or the facts, the court will not consider repeated applications for habeas corpus presenting claims previously rejected." (*In re Clark* (1993) 5 Cal.4th 750, 767.)

5. ______ The petition is denied because the issues raised in the petition could have been but were not raised in an appeal, and no excuse for failing to do so has been demonstrated. "'[I]n the absence of

special circumstances constituting an excuse for failure to employ that remedy, the writ will not lie where the claimed errors could have been, but were not, raised upon a timely appeal from a judgment of conviction.'" (*In re Clark* (1993) 5 Cal.4th 750, 765.)

6. ________ The petition is denied because the petitioner has delayed the petition long after the facts occurred that allegedly justify relief, and he has failed to adequately explain the reason for the delay. A petitioner must justify any substantial delay in presenting a claim by, inter alia, stating when he became aware of the legal and factual bases for his claims, and explaining the reason for any delay since that time. (*In re Clark* (1993) 5 Cal.4th 750, 783, 786-787.)

7. ________ The petition is denied without prejudice because the petitioner has brought prior petitions arising from the same detention or restraint but the current petition fails to describe the nature and disposition of the claims made in those prior petitions. (Pen. Code, § 1475.)

8. ________ The petition is denied without prejudice because the petitioner is represented by counsel.

9. ________ The petition is denied because the petition fails to establish that the petitioner has exhausted available administrative remedies.

10. ________ The petition is denied because the petition is now moot due to changed conditions, e.g., no longer in custody.

11. ________ The petition is denied because the petition is incomplete, unintelligible, and/or unclear.

12. ________ The petition is denied without prejudice because it is not made on Judicial Council form MC-275, and there is not showing of good cause for failing to do so. (Cal. Rules of Court, rule 4.551(a)(1)&(2).)

13. ________ No order to show cause having been issued, the request for appointment of counsel is denied. (Cal. Rules of Court, rule 4.551(c)(2).)

14. XXXXX Other:

Petition is denied. Petitioner has failed to establish prejudice; that is, a reasonable probability that a more favorable outcome would have resulted. In re Cox (2003) 30 C. 4th 974.

In conformity with Penal Code Section 1016.5, Petitioner was advised of the immigration consequences of his plea. Specifically, the felony plea form shows Petitioner's initials right next to the following advisement, "If I am not a citizen of the United States, I understand that this conviction 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." (The court takes judicial notice of its own records--See, the Plea Form filed in Case # RIF 1201641. The plea form was also signed by the Petitioner).

Further, the petition suggests that sometime after petitioner's arrest, he was diagnosed with hypopglycemia and vasovagal syncope. There is no showing in the petition that petitioner had such an attack on the date of arrest. Nor is there a showing of a reasonable likelihood that the jury would have accepted petitioner's explanation for the drug possession. It is purely speculative under these circumstances to suggest that there is

a reasonable probability that a more favorable outcome would have occurred. Certainly, there was a chance for a less favorable outcome. As part of his plea agreement, petitioner pled to "wobbler" offenses. This means that he ultimately has the chance to have these offenses reduced to misdemeanors. Had petitioner been convicted of one of the charged offenses, that is, transportation of a controlled substance in violation of Health and Safety Code section 11379, such conviction would have been to an irreducible felony and the same deportation consequences would apply.

Petitioner had every opportunity to go to trial by simply telling the judge that he did not accept the plea agreement. The court found that petitioner's understood his constitutional rights and waived them.

B. GRANTS:

1. ______ Pursuant to California Rules of Court, rule 4.551(b), the Court invites the respondent, ____________________, to submit an informal response to the petition within 15 days. Should an informal response be submitted, it shall be served on the petitioner. The petitioner shall have an additional 15 days after service of the informal response in which to file a reply. Unless the Court orders otherwise, the matter will be deemed submitted upon the filing of the petitioner's reply or when the time for submitting a reply has expired.

2. ______ Pursuant to California Rules of Court, rule 4.551(c), the court finds that the petition states a prima facie basis for relief. The respondent, ____________________ is ordered to show cause why the petition should not be granted. The respondent is ordered to submit a return to the petition within 30 days. Unless the Court orders otherwise, the matter will be deemed submitted upon the filing of the petitioner's denial or when the time for submitting a denial has expired.

3. ______ An order to show cause having been issued, the request for appointment of counsel is granted. (Cal. Rules of Court, rule 4.551(c)(2)). The Court appoints ____________________ to represent petitioner. The court further orders that payment therefor shall be from the County Treasury. (Cal. Pen. Code Sections 987.2, 987.8(g)(2)(B); Charlton v. Superior Court (1979) 93 Cal.App.3d 858, 862.)

4. ______ Other: ____________________

____

____

C. TRANSFERS:

1. ______ The petition challenges the terms of a judgment. Without determining whether a prima facie case for relief exists, the Court transfers the petition to the Superior Court for the County of ____________________, the county in which the judgment was entered. (Cal. Rules of Court, rule 4.552(b)(2)(A).)

2. ______ The petition challenges the conditions of the inmate's confinement. Without determining whether a prima facie case for relief exists, the Court transfers the petition to the Superior Court for the County of ______________________, the county in which the petitioner is confined. (Cal. Rules of Court, rule 4.552(b)(2)(B).)

3. ______ The petition challenges the denial of parole or the petitioner's suitability for parole. Without determining whether a prima facie case for relief exists, the Court transfers the petition to the Superior Court for the County of ______________________, the county in which the underlying judgment was rendered. (Cal. Rules of Court, rule 4.552(c).)

4. ______ Other: ____

____

____

DATE / SIGNATURE:

Date: 5/29/14 Time: 3:57 p.m

RICHARD T FIELDS — Judge of the Superior Court — Print

[signature] — Judge of the Superior Court — Signature