IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. **RODRIGO MARTINEZ MARTINEZ,** Defendant and Appellant.	S199495 Ct. Ap. No. H036687 Santa Clara County Super. Ct. No. 156569

APPELLANT'S OPENING BRIEF ON THE MERITS

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APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUE PRESENTED FOR REVIEW

In the context of a motion to vacate pursuant to Penal Code section 1016.5, should courts assessing whether a defendant was prejudiced by the lack of immigration advisements be required to consider, in addition to the defendant's prospects at trial, evidence that, had the defendant been properly warned, he or she could have obtained an immigration-neutral disposition, or that he or she would have preferred to risk the outcome of a trial over a certainty of deportation?

SUMMARY OF ARGUMENT

In the context of a Penal Code section 1016.5 motion to vacate based on the trial court's failure to deliver warnings about immigration consequences of a plea, this Court has previously held that "the sentencing court must determine whether the error prejudiced the defendant, i.e., whether it is 'reasonably probable' the defendant would not have pleaded

guilty if properly advised." *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 210. Following that decision, the Court of Appeal for the Second District held that to show prejudice, a defendant was not required to demonstrate a probability of a favorable outcome at trial, but that a likelihood of success at trial may be one factor to consider in assessing whether a defendant would have rejected a plea offer. (*People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240.)

In *Padilla v. Kentucky* (2010) ___ U.S. ___, 130 S.Ct. 1473 (*Padilla*), the United States Supreme Court recognized that "[p]reserving a client's right to remain in the United States may be more important to the client than any potential jail sentence," and that "informed consideration of possible deportation can only benefit both the State and non-citizen defendants during the plea-bargaining process." (*Id.* at p. 1483, 1486.) The Court established a standard for assessing prejudice in cases where a defendant pleads guilty without having been advised about the immigration consequences of his plea which asks whether "a decision to reject the plea bargain would have been rational under the circumstances." (*Id.* at p. 1485.)

The High Court's position is very much in accord with the California Legislature's intent in enacting Penal Code section 1016.5, which was to "promote fairness" for non-citizen defendants. (Penal Code § 1016.5, subd. (d).) Accordingly, the Legislature included a requirement that such

defendants be given "a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant's counsel was unaware" of the immigration consequences of a plea. (*Ibid.*)

Because plea negotiations that take immigration consequences into account are favored by both the Legislature and the U.S. Supreme Court, California courts should focus not on the likelihood of success at trial when assessing prejudice in the context of section 1016.5 motion, but rather on whether rejecting the plea offer would have been rational under the defendant's circumstances as whole. Such circumstances will necessarily include the likelihood of negotiating an immigration-neutral disposition, the impact of immigration consequences on a non-citizen defendant's risk assessment of proceeding with trial, and the strength of any possible defenses versus the strength of the prosecution's case.

Appellant respectfully urges the Court to adopt the clear standard for assessing prejudice set forth in *Padilla* in order to provide guidance and secure uniformity among the lower courts. The decisions below failed to conduct the proper inquiry into whether it was reasonably probable that appellant would have rejected the plea offer if properly advised. Because they focus exclusively on the likelihood of success at trial, and fail to give due consideration to other factors which would have influenced appellant's decision whether to plead guilty, the decisions below are in conflict with *People v. Castro-Vasquez, supra*, 148 Cal.App.4th 1240, and the

Legislative intent behind 1016.5. Therefore, the decisions below must reversed.

STATEMENT OF THE CASE

On July 28, 1992, appellant, Rodrigo Martinez-Martinez, pled guilty to a violation of Health and Safety Code section 11360, subdivision (a), transportation of marijuana. Appellant was neither counseled by his attorney, nor advised by the court at the change of plea hearing, that there was the possibility of adverse immigration consequences as a result of his plea. (1 CT 28, 44-45.) On the court's minute order, a box to be checked if a defendant was properly warned by the Court of the immigration consequences of his plea, is unchecked. (1 CT 28.)

On January 21, 2011, appellant, through counsel, filed a motion to vacate his 1992 conviction pursuant to Penal Code section 1016.5. (1 CT 38.) On February 17, 2011, the Honorable Marc Poché of the Superior Court of Santa Clara County issued a written order denying the motion. (1 CT 91-92.) The court held that appellant was entitled to a rebuttable presumption that he had not been properly advised by the trial court regarding the possibility of immigration consequences prior to his plea. (1 CT 91.) The court further held that appellant had established that his 1992 conviction does indeed have immigration consequences for him. (*Id.*) However, the court found it "highly improbable" that appellant would have been able to negotiate a plea that would not have had adverse immigration

consequences. (1 CT 92.) Second, the court held that it was "unlikely" that appellant would have been found not guilty by a jury, had he elected to exercise his trial rights rather than plead guilty. (*Id.*) Based on these two findings, the court held that appellant had not established that the trial court's failure to warn him about the immigration consequences of his plea had prejudiced him in any way, and denied the motion to vacate. (*Id.*)

On March 10, 2011 appellant filed a notice of appeal and a certificate of probable cause was issued on March 11, 2011. (1 CT 95-96.) On December 9, 2011 the Court of Appeal, Sixth District, quoting the decision of the Superior Court at length, affirmed. (Typed Opn., pp. 3-4.) The Court of Appeal's own analysis of the prejudice issue consisted of the following paragraph:

> We agree with the trial court that the appellant's claim that he would have plead [sic] to a "greater offense," sale of unspecified controlled substance under Health and Safety Code section 11352, subdivision (a) is entirely speculative and it beggars the imagination to suppose that he would have agreed to go to state prison for a term of three, four or five years had he known of the immigration consequences. The distinct problem with appellant's appeal is his inability to demonstrate prejudice. He says only that had he been aware of the immigration consequences of his plea, he would not have entered it and instead gone to jury trial. The jury trial would not have taken long. The observation of a hand to hand sale together with the money and the purchaser would not have offered any difficulty to a jury.

(Typed. Opn., p. 3.)

On January 19, 2012, appellant filed a petition for review of the decision of the Court of Appeal. This Court granted review on March 21, 2012.

SUMMARY OF THE PERTINENT FACTS

Appellant is a native and citizen of Mexico who has lived continuously in the United States since 1991 (1 CT 44.) He is married to Maria Escobedo, a lawful permanent resident of the United States, and has four United States citizen children, ages 13, 12, 10, and 5 years old. (*Id.*)

The following facts are taken from the preliminary hearing held on June 5, 1992. (1 CT 1 et seq.) On or about May 15, 1992, an undercover officer observed appellant exchanging a brown bindle for money with an individual identified as Mr. Ryan. (1 CT 7.) Ryan was subsequently detained and found to be in possession of a brown bindle containing a useable amount of marijuana. (1 CT 8-9.) About an hour later, the officer saw appellant riding on his bicycle and arrested him. (1 CT 9, 10.) Appellant did not have any money or drugs in his possession when he was arrested. (1 CT 10-11.) The trial court found sufficient cause to hold appellant to answer on the charge of transportation or sale of marijuana in violation of Health and Safety Code section 11360, subdivision (a), and appellant subsequently pled guilty as charged. (1 CT 17, 21-22, 28.)

On May 15, 2008, having long ago successfully completed the terms of his probation, Mr. Martinez applied for and was granted a record

clearance pursuant to Penal Code section 1203.4 by the Superior Court of Santa Clara County. (1 CT 37.) In 2008, Mr. Martinez applied for lawful permanent resident status with United States Citizenship and Immigration Services ("USCIS"), using a family-based visa petition filed by his wife's father. (1 CT 44.) However, his application for lawful permanent resident status was denied, and removal proceedings were initiated against him on October 27, 2009. (*Id.*; see also 1 CT 81.)

ARGUMENT

I. IN THE CONTEXT OF MOTIONS TO VACATE PURSUANT TO PENAL CODE SECTION 1016.5, THIS COURT SHOULD ADOPT THE PREJUDICE TEST SET FORTH IN THE U.S. SUPREME COURT'S DECISION IN *PADILLA V. KENTUCKY* WHICH WEIGHS WHETHER IT WOULD HAVE BEEN RATIONAL UNDER THE CIRCUMSTANCES FOR THE DEFENDANT TO REJECT THE PLEA OFFER HAD HE BEEN PROPERLY WARNED.

A. Legislative History and Statutory Requirements of Penal Code section 1016.5

In 1977, the Legislature recognized that "in many instances involving an individual who is not a citizen of the United States charged with an offense punishable as a crime under state law, a plea of guilty or nolo contendere is entered without the defendant knowing that a conviction of such offense is grounds for deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (Pen. Code § 1016.5 subd. (d) (West, 1977).) In enacting section 1016.5, the Legislature demonstrated concern that "those who plead guilty

or no contest to criminal charges are aware of the immigration consequences of their pleas." (*People v. Kim* (2009) 45 Cal.4th 1078, 1107.) Accordingly, with the express intent to "promote fairness to such accused individuals," the Legislature enacted Penal Code section 1016.5, which requires that acceptance of a guilty plea or plea of nolo contendere be preceded by a warning that the plea could have the consequences of "deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (Pen. Code § 1016.5, subd. (d), (a).) Additionally, the Legislature directed courts to "grant the defendant a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant's counsel was unaware of the possibility of deportation, exclusion from admission to the United States, or denial of naturalization as a result of conviction." (Pen. Code § 1016.5 subd. (d).)

Penal Code section 1016.5 further creates a remedy for defendants who were not so advised, by requiring vacatur where the defendant can show that the conviction may have one or more of the enumerated consequences. (Pen. Code § 1016.5, subd. (b).)

> To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement.

(*People v. Totari* (2002) 28 Cal.4th 876, 884.)

Appellant urges the Court to adopt the same standard for assessing prejudice in the context of section 1016.5 motions that the U.S. Supreme Court employed in *Padilla v. Kentucky, supra*, 130 S.Ct. 1473. *Padilla* involved a claim of ineffective assistance of counsel, in which the attorney erred by failing to advise a defendant about immigration consequences that would be triggered by accepting a plea. (*Padilla v. Kentucky, supra*, 130 S.Ct. at p. 1485.) This Court recognized a similar duty of counsel in *In re Resendiz* (2001) 25 Cal.4th 230, abrogated by *Padilla v. Kentucky, supra*, 130 S. Ct. 1473. Although, in California, ineffective assistance of counsel claims are brought via petitions for writ of habeas corpus as opposed to statutory motions to vacate, California courts have recognized that the prejudice inquiries for ineffective assistance of counsel claims and section 1016.5 motions are the same. (See *People v. Castro-Vasquez, supra*, 148 Cal.App.4th at p. 1245-1246, citing *In re Resendiz, supra*, 25 Cal.4th 230, an ineffective assistance of counsel case, for the purposes of analyzing prejudice in the context of a Penal Code section 1016.5 motion.) Therefore, a discussion of prejudice standards from cases involving ineffective assistance of counsel claims is apposite.

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B. The History of the Relevant Legal Standards for Assessing Prejudice in U.S. Supreme Court and California Jurisprudence.

The evolution of the methodology for assessing prejudice in ineffective assistance of counsel claims begins with the two U.S. Supreme Court decisions, *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*) and *Hill v. Lockhart* (1985) 474 U.S. 52 (*Hill*). In *Strickland*, the Court discussed the prejudice analysis in a situation where attorney errors had occurred in the sentencing phase of a capital murder trial. (*Strickland, supra*, 466 U.S. at p. 695.) In that case, the Court considered and rejected the prejudice test used for motions for a new trial based on newly discovered evidence, which requires defendants to prove it is more likely than not that the new evidence would have altered the outcome of the case. The Court concluded that such an "outcome-determinative standard" would not be appropriate as a prejudice test in ineffective assistance of counsel claims. (*Id.* at p. 693.) As the Court explained:

> Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot

> be shown by a preponderance of the evidence to have determined the outcome.

(*Id.* at p. 694, internal citations omitted.) Therefore, the Court held that in cases where attorney error rises to the level of ineffectiveness, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Ibid.*) A reasonable probability is a probability sufficient to undermine confidence in the outcome. (*Ibid.*)

A year later, in *Hill*, the Court considered the test for prejudice where the attorney error impacted the plea-bargaining process specifically. (*Hill v. Lockhart, supra*, 474 U.S. at p. 58.) The Court stated that the test in such circumstances should "focus on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." (*Id.* at p. 59.) In *Hill*, the Court did two things that were significant to the assessment of prejudice. First, the Court again used the lower "reasonable probability" standard as opposed to the higher "more likely than not" standard. (*Ibid.*) Second, the Court acknowledged that because the attorney's error took place during the plea bargaining stage, the appropriate question was not whether the outcome of a trial was affected by the ineffectiveness, but rather whether the defendant's decision to plead guilty was affected: "[T]o satisfy the 'prejudice' requirement, the defendant must show that there is a

reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (*Ibid.*)

Then, in 2010 the U.S. Supreme Court addressed how courts should determine prejudice specifically in the context of a guilty plea entered into without competent advice about immigration consequences. (*Padilla, supra,* 130 S.Ct. at p. 1485.) Adopting a similar standard to that of *Strickland* and *Hill, Padilla* makes clear that the prejudice inquiry should be whether a rational person would have rejected a particular plea, not whether a hypothetical trial outcome would have led to a better result than the plea. (*Ibid.*) "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." (*Ibid.*)

The *Padilla* court did not alter the burden of proof for defendants bringing ineffectiveness claims by framing the question in terms of whether it would have been "rational under the circumstances" to reject a plea offer. (*Padilla, supra*, 130 S.Ct. at p. 1485.) In endorsing a rationalness inquiry, the Court cited its decision in *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 480, which employs the same reasonable probability standard used in *Hill.* (See *Padilla, supra*, 130 S.Ct. at p. 1485.) However, by directing courts to inquire into whether a defendant's decision to reject a plea would have been "rational under the circumstances," the *Padilla* Court makes clear that all of the factors which go into a defendant's decision to plead guilty – rather than

simply a likelihood of success at trial – are relevant in assessing whether it is reasonably probable he would not have pled guilty of properly advised.

Even more recently, the U.S. Supreme Court addressed the prejudice prong of *Strickland*, and expressly rejected a success-at-trial approach to assessing prejudice. (See *Missouri v. Frye* (2012) ___ U.S. ___, 132 S. Ct. 1399.) In that case, defense counsel failed to communicate formal plea offers to the defendant, the offers lapsed, and defendant ultimately pled to a less favorable disposition than the original offers. (*Id.* at p. 1405.) The Court recognized that the context of the error was important when assessing prejudice, and held that where error involved a lost opportunity for a better plea offer, a defendant could demonstrate prejudice without stating that he would have gone to trial had he received correct advice. (*Id.* at p. 1409-1410.) This holding recognizes that, in the context of attorney errors made during the plea bargaining stage of a proceeding, a defendant may not have been limited to either accepting the disputed plea offer or going to trial, as the holding in *Hill* might suggest. As the *Frye* Court noted, "*Hill* does not . . . provide the *sole* means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations." (*Ibid.*; citing *Hill v. Lockhart, supra*, 474 U.S. at 59.)

This Court has long held that when challenging a plea based on misadvisement or omission of collateral consequences, a defendant must demonstrate that it is reasonably probable he would not have entered his

plea had he known of the consequence. (*People v. Walker* (1991) 54 Cal.3d 1013, 1023.) In *People v. Superior Court (Zamudio), supra,* 23 Cal.4th at p. 198, this Court specifically held that the same standard applies to motions brought pursuant to Penal Code section 1016.5. In *In re Resendiz*, this Court presented the prejudice question in effective assistance of counsel claims as being whether or not the defendant would have rejected the original plea offer and proceeded to trial. In *Resendiz*, the defendant brought a habeas petition challenging his plea based on the fact that his attorney had given him incorrect advice about immigration consequences. (*In re Resendiz, supra*, 25 Cal.4th at p. 254.) This Court held that "[i]n determining whether or not a defendant who has pled guilty would have insisted on proceeding to trial had he received competent advice, an appellate court *also may* consider the probable outcome of any trial, *to the extent that may be discerned*." (*Ibid.*, emphasis added.) Not surprisingly, *Resendiz* has been interpreted by lower courts to mean that a defendant's chances at trial are relevant to the prejudice inquiry, but demonstrating a likelihood of success at trial is not required to prove prejudice. (See *People v. Castro-Vasquez, supra*, 148 Cal.App.4th at p. 1245 ["[T]he probable outcome of a trial [is] *one factor* a court could consider in *assessing the likelihood that a defendant would have rejected a plea offer*."]; *People v. Akhile* (2008) 167 Cal.App.4th 558, 565 [a defendant "need not demonstrate a likelihood he would have obtained a more favorable result at

trial"].) Since *Resendiz*, this Court has not addressed the question of how to assess prejudice in cases where a plea was entered without proper advice about immigration consequences.

B. Because A Success-At-Trial Approach Is Particularly Ill-Equipped To Assess Whether or Not a Defendant Would Have Accepted or Rejected a Plea Offer When the Error in Question Involves a Failure to Warn About Immigration Consequences, This Court Must Establish A More Effective Test for Assessing Prejudice.

In the context of motions to vacate pursuant to Penal Code section 1016.5, this Court should employ a similar legal framework to that of the U.S. Supreme Court's decision in *Padilla*. Although *Padilla* shifts the focus of the prejudice test – specifically in cases where a defendant pled guilty without being advised of immigration consequences of the plea – away from a hypothetical trial outcome, to whether it would have been rational for a properly advised defendant to reject the plea bargain, it is not a significant departure from the rule articulated in *Resendiz*. (*Padilla, supra,* 130 S. Ct. at p. 1485; *Resendiz, supra*, 25 Cal.4th at p. 254.) Essentially, *Resendiz* holds that the proper test for prejudice is whether it is reasonably probable that a defendant would have rejected the plea offer had he been properly advised. (*Ibid.*) But *Resendiz* also presumes that a defendant's rejection of the initial plea offer will automatically lead to trial, and specifically mentions the probable outcome of a trial as a relevant factor in assessing whether a defendant would have rejected the initial plea

offer. (*Ibid.*) While the likelihood of success at trial would certainly be a consideration for any defendant during plea bargaining, focusing on a hypothetical trial outcome is particularly unhelpful in assessing prejudice where the error involves a failure to advise the defendant about immigration consequences prior to a guilty plea. Because the standard set forth in *Padilla* requires courts to consider a non-citizen defendant's circumstances as a whole when assessing prejudice, it will be more effective at ascertaining whether it is reasonably probable that a defendant would not have pled guilty of properly advised.

This Court has long recognized that "a noncitizen defendant with family residing legally in the United States understandably may view immigration consequences as *the only ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges*." (*In re Resendiz, supra*, 25 Cal.4th at p. 253, citing *Zamudio, supra,* 23 Cal.4th at pp. 206–207, emphasis added.) The consequence of deportation is particularly severe, because it is "the equivalent of banishment or exile." (*Delgadillo v. Carmichael* (1947) 332 U.S. 388, 390-391.) In *Padilla,* the Court declared that "as a matter of federal law, deportation 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." (*Padilla v. Kentucky, supra,* 130 S.Ct. at p. 1479, emphasis added.) Accordingly, "[p]reserving a client's right to

remain in the United States *may be more important to the client than any potential jail sentence*." (*Id.* at p. 1483, citing *INS v. St. Cyr* (2001) 533 U.S. 289, 323, emphasis added.)

In light of the especially harmful nature of immigration consequences, understanding how deportation, exclusion from admission, or denial of naturalization might be triggered by a particular plea offer will undoubtedly go into a properly advised defendant's decision of whether or not to accept that offer. However, whether or not a defendant knows about these consequences has absolutely no impact on a possible trial outcome, because it will have no affect on the trier of fact's ability to find guilt beyond a reasonable doubt. A court's failure to warn about immigration consequences before a plea will not impact the strength of the prosecution's evidence or of any possible defenses. Consequently, proving prejudice flowing from a failure to warn will be impossible if the court is focused exclusively on whether the defendant would have prevailed at trial. Simply put, if probability of success at trial is the main factor considered by courts assessing prejudice in the section 1016.5 context – where advice about collateral consequences is specifically at issue – defendants will almost never be able to demonstrate prejudice.

Fundamentally, a success-at-trial approach is not the most effective means of assessing whether or not a defendant would have accepted or rejected a particular plea offer, because it ignores the fact that the initial

rejection of a plea does not always lead to trial. Moreover, focusing on the likelihood of success at trial does little to illuminate what a properly warned defendant may have done, if the court does not also factor in the existence of possible defenses, or the impact that knowledge of immigration consequences might have on a non-citizen defendant's decision to take a case to trial. The reality is, if a properly warned defendant rejects an initial plea offer based on a desire to avoid severe collateral consequences like deportation, there are two possible outcomes: 1) he could attempt to re-negotiate a plea agreement with the prosecutor, or a post-plea sentence with the judge, that avoids the consequence; or 2) after incorporating the collateral consequence into his risk assessment, he could elect to take his chances at trial. Because a success-at-trial approach to assessing prejudice in the section 1016.5 context fails to address the complex reality of how a properly warned defendant would respond to a plea offer that triggers severe immigration consequences, it should be expanded to a broader approach that looks at whether a rational person would reject such a plea offer under the circumstances.

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1. **The possibility of obtaining an immigration-neutral plea is a relevant factor in determining whether a properly-warned defendant would have rejected the initial plea offer, and therefore must be considered by courts assessing prejudice in the context of section 1016.5 motions.**

Courts determining whether it would have been rational under the circumstances for a properly warned defendant to have rejected an initial plea offer because of immigration consequences must consider the reasonable probability that the defendant could have negotiated an immigration-neutral plea or sentence that would have avoided those consequences. The reality is that when a defendant rejects an initial plea offer because it carries immigration consequences, further plea negotiation is an equally, if not more likely alternative to trial. Recent statistics cited by the U.S. Supreme Court show that ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. (See *Missouri v. Frye, supra*, 132 S. Ct. at p. 1407, citing Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009[1]; Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, Felony Sentences in State Courts, 2006–Statistical Tables, p. 1 (NCJ226846, rev.

[1] Found at <http://www.albany.edu/sourcebook/pdf/t5222009.pdf> [as of March 1, 2012].

Nov. 2010)[2]; *Padilla, supra,* 130 S.Ct. at p. 1485–1486 [recognizing pleas account for nearly 95% of all criminal convictions].) Ours "is for the most part a system of pleas, not a system of trials." (*Lafler v. Cooper* (2012) 132 S. Ct. 1376, 1381, citing *Missouri v. Frye, supra*, 132 S. Ct. at p. 1407.) Plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." (*Missouri v. Frye, supra*, 132 S. Ct. at p. 1407, citing Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992), emphasis in original.)

Penal Code section 1016.5 acknowledges the great importance of plea bargaining, specifically directing trial courts to allow defendants made aware of immigration consequences "a reasonable amount of time to *negotiate* with the prosecuting agency." (Pen. Code § 1016.5, subd. (d), emphasis added.) There would be no point in allowing properly advised defendants time to negotiate if their choice was simply between accepting a plea offer with severe immigration consequences or proceeding to trial. The Legislature's reference to negotiation therefore presumes that defendants may have a third choice, by way of negotiated disposition, that avoids immigration consequences without going to trial.

In *Padilla v. Kentucky*, the U.S. Supreme Court also looks favorably on plea negotiations that take immigration consequences into account,

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[2] Found at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc 06st.pdf> [as of Mar. 1, 2012].

noting they are a way to achieve positive outcomes for both non-citizen defendants and prosecutors.

> [I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process. By bringing deportation consequences into this process, the defense and prosecution may well be able to reach agreements that better satisfy the interests of both parties. As in this case, a criminal episode may provide the basis for multiple charges, of which only a subset mandate deportation following conviction. Counsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence. At the same time, the threat of deportation may provide the defendant with a powerful incentive to plead guilty to an offense that does not mandate that penalty in exchange for a dismissal of a charge that does.

(*Padilla v. Kentucky*, *supra*, 130 S.Ct. at p. 1486.)

Understanding that "negotiation of a plea bargain is a critical phase of litigation," the reasonable probability of obtaining an immigration-neutral plea bargain must factor into the test for prejudice in the context of section 1016.5 motions. (*Padilla v. Kentucky, supra*, 130 S. Ct. at p. 1486.) Recent U.S. Supreme Court case law support this. In *Vartelas v. Holder* (2012) ___ U.S. ___, 132 S.Ct. 1479, 1492, fn. 10, the U.S. Supreme Court again recognized the role that creative plea bargaining plays in avoiding immigration consequences. Specifically, the Court commented that, "[a]rmed with knowledge that a guilty plea would preclude travel abroad,

aliens like Vartelas might endeavor to negotiate a plea to a nonexcludable offense—in Vartelas' case, *e.g.*, possession of counterfeit securities—or exercise a right to trial." (*Ibid.*) Although the Court does not expressly cite *Padilla*, the language in the footnote indicates the Court felt it was reasonably probable that Vartelas could have negotiated an alternative disposition, and could potentially establish prejudice by demonstrating that he would have rejected the original offer and sought this alternative plea to avoid adverse immigration consequences. (*Ibid.*, see also *United States v. Kwan* (9th Cir. 2005) 407 F.3d 1005, 1017 opinion amended on reh'g, 03-50315, 2005 WL 1692492 (9th Cir. July 21, 2005) and *abrogated on other grounds by Padilla v. Kentucky*, *supra*, 130 S. Ct. 1473 [in federal criminal proceeding, lost opportunity to "renegotiate plea agreement" to avoid immigration consequences resulted in prejudice to defendant such that vacatur of conviction was proper].)

That the collateral consequences of convictions should be taken into account in criminal proceedings is not new to California. The California Rules of Court provide guidance as to what criteria should be considered when deciding whether to grant probation, and include the affect of imprisonment on the defendant and the impact of collateral consequences from a felony conviction. (California Rules of Court, Rule Rule 4.414(b)(5) and (6).) California courts have held that defendants may be able to demonstrate prejudice in ineffectiveness cases where their attorney fails to

attempt to negotiate an alternative plea that avoids immigration consequences. (See *People v. Bautista* (2004) 115 Cal.App.4th 229, 240.) Both the Los Angeles County and Santa Clara County District Attorney's Offices have explicit policies encouraging consideration of collateral consequences during plea bargaining. (See Los Angeles County Dist. Atty's off. Special Directive 03-04, Collateral Consequences (Sept. 25, 2003)[3]; Santa Clara County Dist. Atty. Jeff Rosen Memorandum: Collateral Consequences (Sept. 14, 2011)[4].) In direct response to the U.S. Supreme Court's decision in *Padilla*, the Santa Clara County District Attorney's Office instituted a new policy to encourage prosecutors to take immigration consequences into account when negotiating plea bargains.

> Intrinsic to the *Padilla* decision is the constitutionality of considering collateral consequences when crafting a settlement. In other words, the court ruled that it was IAC for a defense counsel to fail to advise and *negotiate on behalf of his client for an immigration neutral outcome. Logically essential to this holding is the view that such negotiations would be legal and proper.*

(*Id.* at p. 3, emphasis added.) Given that plea negotiations which in part aim to avoid severe collateral consequences such as deportation are favored by law and even incorporated into explicit policy by prosecutors, it is

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[3] Found at <http://da.co.la.ca.us/sd03-04.htm> [as of June 7, 2012].

[4] Found at <http://www.ilrc.org/files/documents/unit_7b_4_santa_clara_da_policy.pdf> [as of June 7, 2012]; hereinafter cited as Santa Clara County Dist. Atty. Jeff Rosen Memorandum: Collateral Consequences.

imperative that courts considering motions pursuant to section 1016.5 acknowledge the likelihood of obtaining an immigration-neutral plea when assessing prejudice.

2. When courts do consider the possible outcome of a trial in the prejudice analysis for section 1016.5 motions, they must recognize that the risk calculation for non-citizens seeking to avoid immigration problems will be altered by knowledge that a plea offer will trigger immigration consequences.

As discussed in Section I B, *supra*, this Court has long recognized that "a noncitizen defendant with family residing legally in the United States understandably may view immigration consequences as *the only ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges*." (*In re Resendiz, supra*, 25 Cal.4th at p. 253, citing *Zamudio, supra,* 23 Cal.4th at pp. 206–207, emphasis added.) Likewise, the U.S. Supreme Court has declared that "as a matter of federal law, deportation 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." (*Padilla v. Kentucky, supra,* 130 S.Ct. at p. 1479, emphasis added.)

If courts assessing prejudice in the context of a section 1016.5 motion truly aim to discern what a rational person would have done under the circumstances if he had been properly warned, they must acknowledge the truth of the proposition central to the holding in *Padilla*; that the

severity of the collateral consequence is often far greater than the direct penal consequences of the offense. (*Padilla, supra*, 130 S.Ct. at pp. 1481, 1483.) As an example, a misdemeanor drug conviction, which might result in a short county jail sentence, fines, or just probation, will render a non-citizen deportable and permanently inadmissible.[5] In such cases even the maximum punishment after trial would be significantly less onerous than the certain immigration consequences that would be triggered by a plea. A defendant who knows a plea will result severe immigration consequences may rationally calculate that the risk of a longer term of imprisonment after conviction at trial does not outweigh the hardship of deportation. Additionally, courts must recognize that a properly-warned defendant will be encouraged to develop defenses to the charges that may have been previously overlooked or not seriously considered. This, too, would factor into a defendant's risk calculation of whether to reject an immigration-averse plea offer and proceed to trial.

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[5] In California, a conviction for simple possession of more than 28.5 grams of marijuana is punishable by a county jail sentence of no more than six months or a fine of no more than $500, or both. (Health and Saf. Code § 11357, subd. (c).) However, under federal immigration law, possession of more than 30 grams of marijuana renders non-citizens, including lawful permanent residents, deportable. (8 U.S.C. § 1227, subd. (a)(2)(B)(i).) Possession of any amount of marijuana will render a non-citizen inadmissible from the United States. (8 U.S.C. § 1182, subd. (a)(2)(A)(i)(II).)

While it might not be "rational" for a U.S. citizen defendant to reject a particular plea offer, given the risk of an increased sentence at trial, under certain circumstances it may be entirely rational for a non-citizen defendant to do so. Therefore, in order to conduct the proper prejudice analysis courts must consider how the severity of the immigration consequences would affect a defendant's risk calculation about proceeding to trial.

II. THE COURT OF APPEAL AND THE SUPERIOR COURT MISAPPLIED THE TEST FOR ASSESSING PREJUDICE IN THIS CASE AND REVERSAL IS REQUIRED.

Appellant challenges the assessment of prejudice in the decision below, wherein the Court of Appeal and the Superior Court accorded undue significance to what they concluded were appellant's slim chances of an acquittal at trial. Addressing appellant's argument that he would have rejected the plea and gone to trial, the Court of Appeal focused exclusively on what a hypothetical jury would have done: "[t]he jury would not have taken long. The observation of a hand to hand sale together with the money and the purchaser would not have offered any difficulty to a jury." (Typed Opn., p. 3.) As to appellant's argument that he would have be willing to plead up to a violation of Health and Safety Code section 11352, the Court of Appeal dismissed it out of hand, saying such a claim "beggars the imagination" because appellant would have had to agree to a state prison sentence in order to obtain an immigration-neutral plea. (Typed Opn., p. 3.)

The focus on a likelihood of success at trial and outright dismissal of the possibility of further plea negotiation are not in accord with the concerns expressed by the California Legislature in Penal Code section 1016.5, or the United States Supreme Court in *Padilla v. Kentucky, supra*, 130 S.Ct. 1473. Moreover, the decisions below are in conflict with current California law regarding the appropriate test of prejudice in such cases, which holds that proving a likelihood of success at trial was not required to demonstrate to determine of it is reasonably probable that a defendant would not have pled guilty if properly advised. (*People v. Castro-Vasquez, supra*, 148 Cal.App.4th 1240.) Under the prejudice standard set forth in *Padilla*, or under current California law, the decisions below are erroneous and must be reversed.

A. Applying the Standard Set Forth in *Padilla*, the Courts Below Should Have Concluded that the Trial Court's Failure to Advise Appellant Pursuant to Section 1016.5 Prejudiced Appellant, and Reversal Is Required.

Had the courts below applied the U.S. Supreme Court's prejudice test from *Padilla*, they would have sought to determine whether "a decision to reject the plea bargain would have been rational under the circumstances" if appellant been properly advised by the trial court pursuant to Penal Code section 1016.5. (*Padilla, supra*, 130 S.Ct. at p. 1485.) As argued in Section I, *supra*, the factors that courts should consider in determining whether or not it would have been rational under the

circumstances for a defendant to reject a plea offer, are: 1) the possibility of obtaining and immigration-neutral disposition and 2) how knowledge of immigration consequences would impact the non-citizen defendant's assessment of the risks of trial, including the strength of any possible defenses to the charge as well as the relative advantage of the plea measured against the harm of immigration consequences.

1. An immigration-neutral alternative plea was reasonably attainable in appellant's case, had he known to ask for it; thus it would have been rational for appellant to reject the initial plea offer in favor of further negotiations.

Appellant's plea rendered him deportable, permanently inadmissible, and ineligible for relief from removal despite his marriage to a lawful permanent resident and the births of his U.S. citizen children.[6] (1 CT 44.) Had he been warned about the immigration consequences prior to entering his plea, appellant would have "insisted on a plea agreement that would have spared [him] from such immigration damage." (1 CT 45.) One

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[6] Under federal immigration law, a violation of Health and Safety Code section 11360, subdivision (a) constitutes a "violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21[of the U.S. Code])." (8 U.S.C. § 1182, subd. (a)(2)(A)(i)(II).) As such, it renders appellant removable under 8 U.S.C. section 1182, subdivision (a)(2)(A)(i)(II), and ineligible for adjustment of status under 8 U.S.C. section 1255. Moreover, if appellant reenters the United States unlawfully after having been deported, he will be subject to criminal prosecution and imprisonment for up to 20 years. (8 U.S.C. § 1326, subd. (b)(2).)

alternative would have been to "plead up" to a more serious offense that would have been immigration-neutral. (See *People v. Bautista, supra,* 115 Cal.App.4th 229, 240.) Appellant was originally charged with one count of a violation of Health and Safety Code section 11360, subdivision (a), transportation of marijuana. (1 CT 24.) Had he been properly advised about immigration consequences, he could have offered to plead to the nominally more serious offense of violating Health and Safety Code section 11352, subdivision (a).

Health and Safety Code section 11352, subdivision (a), exposes the defendant to state prison sentences of "three, four, or five years," as opposed to the "two, three or four years" a defendant is exposed to under Health and Safety Code section 11360, subdivision (a). However, where a defendant pleads to the plain statutory language of Health and Safety Code section 11352, subdivision (a), wherein the type of drug is not specified, the resulting conviction cannot be considered an offense relating to a controlled substance "as specified in section 802 of title 21" of the United States Code (also cited as "Section 102 of the Controlled Substances Act" ("CSA")).

As the Ninth Circuit explained in *Ruiz-Vidal v. Gonzales* (9th Cir. 2007) 473 F.3d 1072, 1078, "California law regulates the possession and sale of numerous substances that are not similarly regulated by the [CSA]," and a "controlled substance" as specified in the California Health and Safety Code is not necessarily "included within the federal ambit of Section

102 of the [CSA]." Therefore, the Ninth Circuit held that where an alien has a California conviction for an offense relating to a "controlled substance," but the substance is not specifically named, the record of conviction will fail to "establish unequivocally that the particular substance which [the alien] was convicted of possessing . . . is a controlled substance as defined in section 102 of the [CSA]." (*Id.* at p. 1079.) The conviction therefore cannot form the basis of an order of removal or a denial of immigration relief. (*Id.*; see also *Tokatly v. Ashcroft* (9th Cir. 2004) 371 F.3d 613, 620.) Accordingly, had the trial court properly advised appellant pursuant to Penal Code section 1016.5, he could have offered to "plead up" to the more serious offense under Health and Safety Code section 11352, subdivision (a), and avoid the disastrous immigration consequences he now faces.

This alternative plea would have been attainable during the original proceedings because it is "reasonably related" to the charged offense, satisfying the concern that "the defendant's record, while not a completely accurate portrayal of his criminal history, will not be grossly misleading and thus will not likely result in inappropriate correctional treatment or police suspicion." (*People v. West* (1970) 3 Cal.3d 595, 613.) Under both sections 11360 and 11352, any person who "transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to

import into this state or transport" a listed controlled substance is guilty of a felony. (Health and Saf. Code §§ 11352, subd. (a); 11360, subd. (a).) Moreover, both statutes involve controlled substances in the state of California, and permit a sentencing court to impose narcotics offender registration, drug treatment, and mandatory testing as part of appellant's probation, thereby fulfilling the state's interest in reducing drug crime recidivism. (See Health and Saf. Code §§ 11376 (drug counseling); 11551 (drug testing as condition of probation); 11590 (narcotics offender registration).

Given the severity of the immigration consequences triggered by appellant's plea, appellant's willingness to risk a greater custodial sentence with a plea to a violation of section 11352 is completely rational. Because appellant's original sentence was probation with 111 days in jail, despite a possible maximum of four years in prison, it is highly unlikely that the prosecution would have insisted on a vastly greater sentence in exchange for an immigration-neutral plea. In fact, what "beggars the imagination" (typed opn., p. 3.), is why such grossly disparate treatment would be expected. There is no reason to presume, as the decision below does, that had appellant pled up to section 11352 to avoid immigration consequences, the court would have imposed a vastly greater custodial sentence, where the facts of appellant's criminal conduct remain unchanged. In fact, it is extremely likely that if appellant had pled up to a violation of section

11352(a), the court would have agreed to the same disposition imposed in this case – probation with a moderate county jail sentence

Under *Strickland v. Washintgon, supra*, 466 U.S. 668, 695, this Court must consider the issue of prejudice in the abstract without regard to "unusual propensities toward harshness or leniency" on the part of a particular decision maker. In *Hill v. Lockhart, supra*, 474 U.S. 52, the Court cited *Strickland* for the proposition that an assessment of prejudice should be based upon a "reasonable decision maker." The decision below presupposes an unreasonable decision maker would insist on a prison term in exchange for appellant's plead up to an immigration-neutral charge, despite the initial offer of a no-prison sentence, and is therefore erroneous as a matter of law.

2. The advantage of the plea offer was not so great as compared to the harm of the immigration consequences, nor his defense to the charges so weak, that it would have been irrational for appellant to have rejected the plea offer and gone to trial.

Despite all the weight of authority from this Court and the U.S. Supreme Court about how immigration consequence affect a non-citizen defendant's decision whether to plead guilty or go to trial, the Court of Appeal in this case failed to acknowledge that, had appellant been properly warned pursuant to section 1016.5, his risk calculation about going to trial would have been altered. (Typed. Opn. at p. 3.)

In appellant's case, the immigration consequences of his 1992 plea of guilty are exceptionally severe: He has been rendered deportable as a result of his conviction, and once deported, will be permanently inadmissible from the United States. When he pled guilty in 1992, his conviction made it impossible for him to ever obtain lawful immigrant status in the United States, even after his marriage to a legal resident or the births of his U.S. citizen children. (1 CT 44.) In light of the extreme hardship that will result from the immigration consequences triggered by appellant's plea, it would have been entirely rational for him to reject the plea had he been properly advised pursuant to Penal Code section 1016.5.

Appellant faced a maximum penalty faced of "two, three, or four years" had he been convicted at trial. (Health and Saf. Code § 11360, subd. (a).) However, in light of the fact that appellant was actually sentenced to a mere 111 days in jail and three years of probation, it is reasonable to infer that something less than the maximum sentence of 4 years would have been imposed by the court after conviction at trial. (1 CT 92.) Moreover, appellant waived his constitutional rights to plead not guilty, to a jury of his peers, to a speedy and public trial, against self-incrimination, to produce witnesses and evidence on his behalf, to confront his accuser, and to cross examine witnesses against him. Appellant's waiver of his trial rights is no trivial matter, given that appellant had a reasonable defense to the charges.

Despite the Court of Appeal's assertions to the contrary, the case against appellant was far from iron-clad. The record clearly demonstrates that there were weaknesses in the prosecution's case sufficient to persuade a properly warned defendant to choose to go to trial if an immigration-neutral plea could not be reached. As appellant's trial counsel pointed out:

> This is essentially a one-witness case involving the officer who saw what he perceived to be an apparent hand-to-hand . . . drug transaction. He detained the alleged buyer in that transaction allowing the seller to carry on on his bicycle who — with whom he lost visual observation for then nearly an hour. When he arrested [appellant] some one hour later and some .68 miles away, he searched [appellant] and found no indicia of any kind of drug sales and no money on him as well.

(1 RT 7.) Even the District Attorney acknowledged that there were "weaknesses" in the prosecution's case that could lead to an acquittal. (1 RT 9.) There can be no doubt that appellant would have given particular consideration to the weaknesses in the prosecution's case against him had he known the plea offer would trigger disastrous immigration consequences.

The decisions below failed to give due consideration to all of the factors appellant, had he been properly advised, would have weighed in his decision to accept or reject the plea offer. Had the Court of Appeal and the Superior Court properly applied the prejudice standard from *Padilla*, they would have concluded that it would have been "rational under the

circumstances" for appellant to have rejected the plea offer. (*Padilla, supra*, 130 S.Ct. 1485.)

B. Had the Courts Below Properly Applied the Test For Prejudice Set Forth in *Zamudio*, They Would Have Concluded that Appellant Was Prejudiced by the Lack of Section 1016.5 Advisements.

Under current California law, the court's task is to determine if it is "reasonably probable the defendant would not have pleaded guilty if properly advised." (*Zamudio, supra*, 23 Cal.4th at p. 210.) The Court of Appeal's decision, which focuses narrowly and exclusively on appellant's chances of an acquittal at trial, fails in any way to address the critical question: how would appellant have responded to the initial plea offer if properly warned? Despite the severity of the immigration consequences for this appellant, his knowledge about them would not have changed the strength of the evidence against him. However, appellant's knowledge of the consequences of the plea offer during the initial proceedings would most certainly have altered his personal risk calculation about going to trial, and motivated him to continue plea negotiations with the prosecution in hopes of securing an immigration-neutral disposition. (1 CT 45.) Had the courts below properly applied the prejudice standard set forth in *Zamudio*, including giving due consideration to the special circumstances of a non-citizen defendant, they would necessarily have concluded that it is

reasonably probable appellant would have rejected this plea offer had he been properly advised.

First, as argued, in Section I, C, *supra*, the support for plea bargaining in which both the prosecution and the defendant take immigration consequences into account is overwhelming. As the District Attorney for Santa Clara County wrote: "a dominant paradigm has emerged – prosecutors should consider both collateral and direct consequences of a settlement in order to discharge our highest duty to pursue justice." (Santa Clara County Dist. Atty. Jeff Rosen Memorandum: Collateral Consequences.) The official policy of the Santa Clara County District Attorney's office is to take collateral consequences such as deportation into account when insuring that justice is done:

> The highest duty of the prosecutor is to ensure that both the charges and ensuing punishment fit the crime. Collateral consequences are the inevitable product of criminal behavior. It is not generally the duty of a prosecutor to mitigate the collateral consequences to a defendant of his or her crime. However, in those cases where the collateral consequences are significantly greater than the punishment for the crime itself, it is incumbent upon the prosecutor to consider and, if appropriate, take reasonable steps to mitigate those collateral consequences . . . In those cases where a prosecutor mitigates either a charge or sentence in order to ensure a just resolution, the prosecutor should ensure that the totality of the resolution remains equitable with that offered to other similarly situated defendants. In other words, the facts of each case must be carefully evaluated to ensure equality and justice.

(*Ibid.*) Therefore, in weighing the reasonable probability that a properly warned defendant would reject an initial plea offer if it would lead to

onerous immigration consequences, courts must recognize that in such cases further plea bargaining can and should be pursued.

In the instant case, the Court of Appeal erred when it presumed an unreasonable outcome from further plea negotiations had appellant been properly warned about immigration consequences and rejected the initial plea offer. Appellant argued that there was a reasonable probability that the prosecutor would have accepted a "plea up" from the original count of Health and Safety Code section 11360, subdivision (a), to the more serious offense under section 11352, subdivision (a). As explained in Section II, A, 1, *supra*, Health and Safety Code section 11352, where the drug is not named, cannot be considered a controlled substance offense under federal law, and does not trigger immigration consequences. (See *Ruiz-Vidal v. Gonzales,* supra,473 F.3d at p. 1078.) However, even though appellant's actual sentence was only 111 days in county jail, the Court of Appeal presumed that to avoid immigration consequences, the prosecutor or the court would have demanded a prison sentence of "three, four or five years." (Typed. Opn., p. 3.) Such an outcome would not only be unjust and unreasonable, it is also improbable in light of the overwhelming recognition that justice is best served when plea negotiations take immigration consequences into account.

Second, the Court of Appeal focused on how a jury would weigh the evidence against appellant, without any regard whatsoever for how

appellant's decision-making process during plea bargaining might be affected by the knowledge that a plea to Health and Safety Code section 11360, subdivision (a) would guarantee his permanent banishment from the United States. (Typed Opn., p. 3.) A prejudice analysis focused on success at trial, to the exclusion of all other factors, is in conflict with current California law, which does not require defendants to prove a likelihood of success at trial. (*People v. Castro-Vasquez, supra*, 148 Cal. App. 4th 1240.) More importantly, such an analysis completely bypasses the actual inquiry required by *Zamudio*, which is whether it is "reasonably probable the defendant would not have pleaded guilty if properly advised." (*Zamudio, supra*, 23 Cal.4th at p. 210.)

As argued in Section II, A, 2, *supra*, objective evidence indicates that the case against appellant was not unbeatable. The District Attorney acknowledged there were weaknesses that could have led to an acquittal. (1 RT 9.) Under California law, appellant was not required to prove he would have prevailed in a jury trial. (*People v. Castro-Vasquez, supra*, 148 Cal. App. 4th 1240.) Thus, appellant need not prove that the prosecution's case against him was unwinnable, but rather that the weakness in the prosecution's case demonstrate that it is reasonably probable defendant would have preferred his chances at trial over a plea offer guaranteed to result in his deportation. Because the decisions below overlooked this factor, it follows that they misapplied the standard for assessing prejudice

under California law. As demonstrated above, a proper assessment would have concluded that appellant was prejudiced by the trial court's lack of advisements pursuant to Penal Code 1016.5, and reversal is required.

CONCLUSION

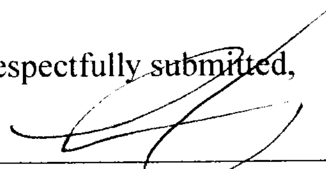
The standard for assessing prejudice established by the U.S. Supreme Court in *Padilla*, which requires courts to determine if it would have been rational under the circumstances for a properly advised defendant to reject the plea offer, is the best method for determining whether it is reasonably probable that a defendant would not have pled guilty if properly advised. Although the *Padilla* standard in no way lessens a defendant's burden of proof in the context of section 1016.5 motions, it clarifies for lower courts that the prejudice analysis must focus on how a non-citizen defendant's circumstances will affect his decision-making process during plea negotiations. Such circumstances necessarily include the availability of immigration-neutral alternative pleas, the relative harm of the immigration consequences versus the benefit of the proffered plea, and strength of the prosecution's case versus any available defenses to the charge.

However, regardless of whether the Court chooses to adopt the language of *Padilla*, it should reverse the decisions below, which failed to properly address all of the factors appellant would have considered in deciding whether or not to accept the proffered plea, had he been properly

warned pursuant to Penal Code section 1016.5. For all the reasons described herein, the Court should reverse the decision of the Court of Appeal, with instructions that the Superior Court grant appellant's motion to vacate his conviction pursuant to Penal Code section 1016.5.

Dated: June 8, 2012

Respectfully submitted,



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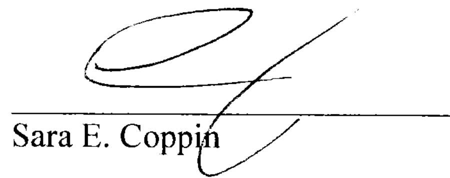
CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c)(1), I hereby certify the number of words in Appellant's Opening Brief is 9,459 based on the calculation of the computer program used to prepare this brief. The applicable word-count limit is 14,000.

Dated: June 8, 2012



Sara E. Coppin

DECLARATION OF SERVICE

Re: People v. Rodrigo Martinez-Martinez No. H036687

I, Sara E. Coppin, declare that I am over 18 years of age, employed in the County of San Francisco, and not a party to the within action; my business address is 11075 Treehenge Lane, Auburn, CA 95602, I am a member of the bar of this court.

On June 8, 2012, I served the within

APPELLANT'S OPENING BRIEF ON THE MERITS

on each of the following, by placing true copies thereof in envelopes addressed respectively as follows, and sending via United States Postal Service:

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 8, 2012, at Auburn, California.

SARA E. COPPIN