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. S225193
Fourth Dist. Case No. E060758

Related Case No. S225194
(Re Denial of Habeas Petition)
Fourth Dist. No. E061436

PETITIONER'S OPENING BRIEF ON THE MERITS

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

AJ KUTCHINS
PO Box 5138
Berkeley, California 94705
(510) 841-5635
State Bar No. 102322
ajkutchins@earthlink.net

Attorney for Petitioner
RON DOUGLAS PATTERSON

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INTRODUCTION

Petitioner is a Canadian citizen who has been living legally in the United States for nearly 20 years; he works as a registered nurse in a cardiac care unit in Rancho Mirage. He had never before been in trouble with the law when, in July, 2011, a police officer spotted him weaving wildly down the highway. The officer gave chase; Petitioner eventually pulled over and emerged from his car, disoriented and incoherent. Petitioner was arrested – initially for driving under the influence – and ultimately charged with evading the officer and with possession of a variety of drugs, each found in a very small quantity in a metal box retrieved from his car.

Petitioner maintained then (and maintains now) that he was innocent: Police tests showed that he was in fact sober and drug free,[1] and he was subsequently diagnosed with a hypoglycemic condition that resulted in further blackouts; the box of drug "samples," he says, was left in his car by someone to whom he gave a ride. But, following his lawyer's advice, he accepted a take-it-or-leave it plea bargain involving what he thought was a very lenient disposition.

What Petitioner did not know when he took the deal was that, by doing so, he was guaranteed to lose his profession and be banished forever from the country that, over nearly two decades, has become his home. When he learned of this pending catastrophe, Petitioner promptly brought on a motion to withdraw his plea pursuant to Penal Code, section 1018.[2]

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[1]As discussed, *post*, Petitioner was not ultimately charged with either driving under the influence or being under the influence of a controlled substance.

[2]Further statutory references will be to the Penal Code, unless otherwise specified.

The trial court denied the motion, citing the fact that Petitioner had received the boilerplate advisement (per section 1016.5) to the effect that a guilty plea could possibly have adverse immigration consequences.

As this Court and the United States Supreme Court both have recently spelled out, "deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants." (*People v. Martinez*, 57 Cal. 4th 555, 563-64 (2013); quoting, *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010)). And it is now well-recognized that, for such a defendant, there is a world of difference between being generally aware that there "may be" adverse immigration consequences, and the specific knowledge that he will certainly and automatically be deported and barred forever from returning to his home in the United States. *INS v. St. Cyr*, 533 U.S. 289, 325 (2001) ["There is a clear difference . . . between facing possible deportation and facing certain deportation"]; see also, *Padilla*, 559 U.S. at 364; *United States v. Rodriguez-Vega*, ___ F.3d ___, 2015 U.S. App. LEXIS 14291, *20 (9th Cir. Aug. 14, 2015); *United States v. Bonilla*, 637 F.3d 980, 984 (9th Cir. 2011); *Ortega-Araiza v. State*, 2014 WY 99, P15 - P17, 331 P.3d 1189, 1195-97 (Sup. Ct. Wyo. 2014) *Commonwealth v. DeJesus*, 468 Mass. 178, 181-82 & n. 7; 9 N.E.2d 789, 795-96 & n. 7 (Sup. Jud. Ct. Mass. 2014).

Under the specific circumstances of this case, the trial court abused its discretion when it refused to let Petitioner withdraw his plea, and thus consigned him to a punishment that he did not foresee and that is far worse than any he knowingly would have accepted.

ISSUES PRESENTED FOR REVIEW

1. Whether a noncitizen defendant who has entered a guilty plea that will clearly and certainly result in mandatory deportation, whose counsel neither discerned that fact nor informed the defendant of it, and who has demonstrated a reasonable probability that she or he would not have accepted the plea had he been properly informed, should be permitted to withdraw that plea pursuant to Penal Code §1018.

2. 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 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

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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).

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 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**." (Rev. Pet., 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, 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 (Rev. Pet. 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; Rev. Pet. 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, asserting that he had been denied the effective assistance of counsel guaranteed by the United States and California constitutions. 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).

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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*.

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, Rev. Pet. 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*.

E. Proceedings in this Court

Petitioner timely filed petitions in this Court seeking review of the denials of both his direct appeal and his *habeas corpus* petition. At the Court's suggestion, Petitioner asked that his Petition for Review pertaining to the *habeas corpus* case be treated instead as a (new) Original Petition for Writ of Habeas Corpus. In response, on June 17, 2015, the Court issued its Order to Show Cause, returnable before this Court, as to why the *habeas* petition should not be granted. On that same day, the Court granted review of the denial of the direct appeal in the instant case.

On April 13, 2015, while the petitions were pending before this Court, Petitioner was arrested by the federal Immigration and Customs Enforcement Agency, which commenced deportation proceedings based on his conviction in the underlying case. After some weeks, he was released on bond pending this Court's determination of these related cases.

LEGAL ARGUMENT

A. The Fact That Petitioner Did Not Know That His Guilty Plea Will Have Unavoidable And Catastrophic Consequences, Including Mandatory Deportation And Loss Of His Professional License, Provided "Good Cause" To Withdraw That Plea Pursuant to Section 1018

Petitioner sought, and still seeks, to withdraw his guilty plea because, when he entered it, he did not know that his resulting conviction would have the automatic and unavoidable effect of shattering his life by depriving him of his profession and leaving him defenseless against arrest and indefinite detention by federal immigration authorities. That detention will end only when he is permanently banished from this country – his home for the better part

of two decades. Permitting withdrawal of a plea under such circumstances is squarely within the purpose, stated policy and language of section 1018, and the trial court abused its discretion when it denied Petitioner's motion.

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 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); quoting, *People v. Dena*, 25 Cal. App. 3d 1001, 1012–1013 (1972); quoting *People v. McGarvy* , 61 Cal. App. 2d 557, 564 (1943).[5]

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[5]It is vital to recall a key consideration underlying this liberal policy: In moving to withdraw his plea, Petitioner is not seeking a free pass, or any sort of absolution from liability. On the contrary; if he succeeds, he will again be facing all of the charges leveled against him and will be forced to either negotiate a new agreement that is satisfactory to the prosecution (but less of a disaster for him), or defend himself at trial. *See*, *People v. Martinez*, 57 Cal. 4th at 565; *DeBartolo v. United States*, 790 F.3d 755, ___, 2015 U.S. App. LEXIS 10831, *5-6 (7th Cir. 2015) ["DeBartolo unquestionably wants to roll the dice, which (continued...)

Thus while the decision whether to grant a motion to withdraw a plea is committed to the discretion of the trial court (see, *e.g.*, *People v. Superior Court (Giron)*, 11 Cal.3d 792, 797-98 (1974)), the statute's express policy greatly tempers that discretion. As the leading commentators have summarized: "In accord with the general policy of courts to protect the defendant's opportunity for a fair hearing, even when its loss is attributable in some degree to the defendant's own neglect, P.C. 1018 provides that the statute must be liberally construed to effect those objects and to promote justice. Hence, appellate courts have frequently found discretion abused . . . ." 4 Witkin & Epstein, *California Criminal Law* (4th ed. 2012) Pretrial Proceedings, § 328, p. 608, discussing, *inter alia, People v. Ramirez, supra*; and *People v. McGarvey, supra.*

"As 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). In the instant case, it is undisputed that Petitioner was ignorant of the actual, catastrophic effects that his plea, and the conviction that followed, would have on his right to remain in the United States and his ability to practice his profession. As this Court made clear in *Giron*, a defendant's ignorance of the immigration consequences of his plea provides a valid basis for seeking to withdraw it. *Giron*, 11 Cal.3d at 797 ["The court might consider that justice would not be promoted if an accused, willing to accept a misdemeanor

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[5](...continued)
is strong evidence that he also would have chosen to roll the dice four years ago had he known about the deportation threat. He faces the same risk of conviction and a long sentence now that he did then. His personal choice to roll the dice is enough to satisfy the 'reasonable probability' standard [to establish prejudicial ineffective assistance of counsel]."]

conviction and probationary status, cannot by timely action revoke his election when he thereafter discovers that much more serious sanctions, whether criminal or civil, direct or consequential, may be imposed."]; see also, *People v. Perez,* 233 Cal.App.4th 736, 738 (2015) [holding that defendant's faulty understanding of immigration consequences, resulting from ineffective assistance of trial counsel, constitutes grounds for relief under § 1018].[6]

Nor can it fairly be denied that Petitioner's ignorance "overreached" his clear judgment, for he never would have taken the deal if he had known what was truly at stake. The basic realities were reiterated quite forcefully by this Court:

> 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. . . . This court has found that "criminal convictions may have 'dire consequences' under federal immigration law and that such consequences are 'material matters' for noncitizen defendants faced with pleading decisions." "A deported alien who cannot return 'loses his job, his friends, his home, and maybe even his children, who must choose between their [parent] and their native country.'" Indeed, a defendant "may view immigration consequences as the only ones that could affect his calculations

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[6] Because *Giron* was decided before the Legislature adopted section 1016.5 (in fact, the decision provided some of the impetus for the adoption of the statute), the defendant in that case was completely unaware of even the possibility of adverse immigration consequences, while the defendant in *Perez* was erroneously assured by his lawyer that, so long as his sentence was only 180 days, he would not be deported. In regard to the instant case those are distinctions without a difference. Although Petitioner had been told that there was some undefined possibility of adverse immigration consequences, the underlying principle remains the same for – as *Padilla* and its progeny make clear – counsel has a duty to give needed advice (and not just to refrain from giving erroneous advice), and for the defendant, knowing that there is a theoretical chance that an immigration disaster *might* occur is no substitute for certain knowledge that it *will* occur. *See* authorities cited on p. 2, *ante,* and pp. 22-24, *post.*

regarding the advisability of pleading guilty to criminal charges," such as when the defendant has family residing legally in the United States. "Thus, even before the Legislature expressly recognized the unfairness inherent in holding noncitizens to pleas they entered without knowing the consequent immigration risks, we held that justice may require permitting one who pleads guilty 'without knowledge of or reason to suspect' immigration 'consequences' to withdraw the plea." We therefore found that "affirmative misadvice regarding immigration consequences can in certain circumstances constitute ineffective assistance of counsel."

The United States Supreme Court, in *Padilla v. Kentucky,* similarly held that relief for the ineffective assistance of counsel may be available to a defendant whose attorney failed to advise him or her of the immigration consequences of a plea. It observed, "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." 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) [citations omitted].

This case presents a compelling example of the situation described by the Court. As reviewed above, the inescapable consequence of the plea that was entered is that Petitioner can be arrested at any time, held indefinitely with no possibility of bond, deported and never allowed to return – and stripped of his livelihood to boot.

Petitioner avers that if he had known of the actual consequences, he would have declined the plea bargain and taken his chances at trial, unless a less calamitous alternative agreement could have been reached. (CT 38-39). That sworn assertion is credible and well-supported by the underlying facts. Although Petitioner was originally arrested for driving under the influence, no such charge was included in the complaint.[7] That is clearly because – despite the fact that Petitioner was given blood and breath tests at the scene – there is no record evidence indicating that he was in fact intoxicated on either alcohol or drugs.

Absent such evidence, the only apparent explanation for his wild driving, failure to stop for the officer, and disorientation when apprehended is that – as he contends – his conduct that day was the result of his subsequently-diagnosed hypoglycemia, and not substance abuse. And that fact, in turn, greatly bolsters Petitioner's consistent assertion that the drugs that were found in his car were not his, and that he had no knowledge of their presence.

In short, the record demonstrates far more than the minimal predicate showing required in this regard: that Petitioner's ignorance of the ruinous immigration and

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[7]Nor, for that matter, was he charged with being under the influence of a controlled substance in violation of Health and Safety Code, § 11550(a).

employment effects of his plea influenced his decision to make it, and that he has a potentially viable defense. *People v. Ramirez*, 141 Cal. App. 4th at 1507; *People v. McGarvy*, 61 Cal. App. 2d at 564; see also, *People v. Martinez*, 57 Cal. 4th at 559 [for purposes of motion to vacate a conviction pursuant to section 1016.5, prejudice is established if defendant shows a reasonable probability that he would not have accepted the plea and would instead have either gone to trial or sought a different plea bargain; he need not prove that he would likely have prevailed at trial]; see also, *id.* at 562-63 [reviewing, with approval, cases in which the same prejudice showing was sufficient to support withdrawal of plea under section 1018]. It follows that Petitioner established "sufficient cause to permit a change of plea from [no contest] to not guilty." *People v. Ramirez*, 141 Cal. App. 4th at 1507; *People v. McGarvy*, 61 Cal. App. 2d at 564.

B. The Trial Court Abused Its Discretion By Refusing To Consider Whether Petitioner Was Adequately Informed And Truly Aware Of The Actual Consequences Of His Plea

The trial court acknowledged quite frankly the implications of the conviction for Petitioner: "the federal consequences are disastrous." (RT 10). In nonetheless denying Petitioner's motion to withdraw, the trial court placed fulsome reliance on the fact that he had been advised, per section 1016.5, that his conviction "*may have*" the adverse immigration consequences of deportation, exclusion from the United States "or denial of naturalization . . . ." (RT 8 [emphasis supplied]). Given that fact, the court opined, "the cases have said that your subjective – the defendant's subjective level of understanding is, I don't think, relevant because anybody can come in and say, oh, I didn't really understand. . . . . The fact

that 1016.5 uses the word [*sic*] 'may have the consequences' is totally sufficient. And I don't think *Padilla* is relevant. That has to do with misadvisement. This is not misadvisement." (RT 8-9).

With all due respect, the trial court's analysis was almost exactly backwards. The motion to withdraw a plea under section 1018 does indeed turn on the defendant's "subjective level of understanding" – that understanding (or, more precisely, the lack of such understanding) is what the inquiry into the defendant's "ignorance" imports. As discussed, there is no dispute about the fact that Petitioner was ignorant of the actual immigration and professional effects of his plea, nor about the fact that, had he known of them, he would not have entered the plea. That, as we have shown, satisfies the long-established and liberal test for permitting withdrawal of pleas under section 1018. Insofar as the trial court refused to apply the established standard for ascertaining the existence of "good cause" to withdraw a plea under section 1018, it perforce abused the discretion afforded it under that statute. *See*, *In re Marriage of LaMusga*, 32 Cal. 4th 1072, 1105 (2004) ["'discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action.'"], quoting, *In re Carmaleta B.*, 21 Cal.3d 482, 496 (1978); see also, *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429, 435-436 (2000).

The trial court also abused its discretion in an even more profound sense by ignoring the specific facts before it and substituting an inapplicable generalization in their stead. For decades, "the courts [have] defined the discretion vested in the trial court to set aside a plea of guilty as follows: 'This discretion means a sound judicial discretion – not an arbitrary or

fanciful choice of alternatives, but a reasonable and fair judicial determination of what is right under the law as applied to the facts.'" *People v. Thompson*, 10 Cal. App. 3d 129, 134-135 (1970); quoting, *People v. McDonough,* 198 Cal.App.2d 84, 90 (1961); see also, *People v. Superior Court (Alvarez)*, 14 Cal. 4th 968, 978 [observing that "all discretionary authority is contextual . . . ."]. Here, instead of examining what the Petitioner knew – and, more important, didn't know – about the effects of his plea, and what difference that made under the facts of this case, the trial court substituted a flat rule: so long as a defendant has received the advisements required under section 1016.5, the immigration effects of his conviction – no matter how horrible – cannot give rise to "good cause" to withdraw that plea.[8]

The question thus comes down to whether the "good cause" to withdraw the plea, established by the fact that Petitioner was indisputably ignorant of the reality that his conviction certainly and unavoidably *would* result both in his deportation and the loss of his profession, was somehow vitiated by the fact that he had been advised that adverse

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[8]To be sure, if Petitioner had instead brought on a statutory motion to withdraw his plea pursuant to section *1016.5*, the trial court's response would have been appropriate and Petitioner would have not have been entitled to any relief, for that statute requires only that the defendant receive the advisement set out therein. See, *People v. Superior Court (Zamudio)*, 23 Cal.4th 183 (2000). But, unlike the prophylactic approach at the heart of section 1016.5, a motion to withdraw pursuant to section 1018 requires an inquiry into the specific question of whether the defendant was ignorant of critical facts that, had he known them, would have prevented him from entering the plea. See, *e.g., People v. Ramirez*, 141 Cal. App. 4th at 1507. As discussed, ignorance of the immigration consequences of a plea clearly satisfies this standard. *See, Giron*, 11 Cal.3d at 797; *Perez*, 233 Cal.App.4th at 738.

immigration consequences *might* occur.[9] It is here that the Supreme Court's opinion in *Padilla v. Kentucky,* 559 U.S. 356, most certainly is "relevant." [10]

The starting point for the *Padilla* Court was the "dramatic" changes that have occurred in federal immigration law over the years (*id.* at 360-64), and specifically those implemented in 1996, when Congress eliminated virtually all judicial and administrative discretion when it comes to deporting those convicted of crimes involving drugs:

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[9]We note that the trial court's "floodgates" rationale itself fails to hold water, and has been rejected by both the United States Supreme Court and this Court:

> [A]s observed by the United States Supreme Court in *Padilla v. Kentucky*, "an 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 ... ." And, as this court explained in *Resendiz*, "[t]he choice ... that petitioner would have faced at the time he was considering whether to plead, even had he been properly advised, would not have been between, on the one hand, pleading guilty and being deported and, on the other, going to trial and avoiding deportation." The defendant thus must convince the court he or she would have chosen to lose the benefits of the plea bargain despite the possibility or probability deportation would nonetheless follow.

People v. Martinez, 57 Cal. 4th 555, 565 (Cal. 2013); quoting, *Padilla*, 559 U.S. at 373, and *In re Resendiz*, 25 Cal. 4th 230, 254 (2001).

[10]As will be detailed in the text, the courts below completely misapprehended *Padilla*, both in terms of the specific holding in that case and its larger significance. For now it is sufficient to note that the lower courts' shrugging interpretation of *Padilla* as a "misadvisement case" is precisely the opposite of what the Supreme Court held. Rather than limit relief to defendants who had received "affirmative misadvice" the Court in *Padilla* explicitly rejected any such limitation, and held that counsel is not just required to give accurate advice when advice is sought, but instead must also investigate and affirmatively provide specific information regarding the actual immigration consequences of a plea whenever – as in this case – those consequences are "truly clear." *Id.* at 569-570.

> Under contemporary law, if a noncitizen has committed a removable offense after the 1996 effective date of these amendments, his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses. Subject to limited exceptions, this discretionary relief is not available for an offense related to trafficking in a controlled substance. These changes to our immigration law have dramatically raised the stakes of a noncitizen's criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important. These changes confirm our view 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.

Id. at 363-64 [citations omitted].[11]

Because the likelihood of deportation now may be the most important consideration

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[11]The concrete effects of those changes were underlined by New York's highest court in an opinion holding that a noncitizen defendant was entitled to withdraw his plea because of lack of advice regarding its immigration consequences:

> Changes in immigration enforcement have also increased the likelihood that a non-citizen defendant will be deported after a guilty plea. For example, at the time of the passage of the 1996 amendments to the INA, the number of annual deportations resulting from criminal convictions stood at 36,909 (see Department of Homeland Security 1996 Yearbook of Immigration Statistics, Annual Report on Enforcement, 171 (1997)). Thereafter, the federal government deported an ever-growing number of individuals each year, and in 2011, the United States removed 188,382 non-citizens based on their criminal convictions (see Department of Homeland Security 2011 Yearbook of Immigration Statistics, Annual Report on Immigration Enforcement Actions, 5-6 (2012)) . . . .

People v Peque, 22 N.Y.3d 168, 188, 3 N.E.3d 617, 630-631 (N.Y. 2013).

to a noncitizen considering a guilty or no contest plea, the Supreme Court held that the defendant has not received the effective assistance of counsel unless his or her trial lawyer has investigated the immigration consequences of the proposed plea and – if, as here, it is clear the plea will result in automatic deportation – has so advised the defendant.[12] *Padilla*, 559 U.S. at 369.

Padilla thus 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. As the Supreme Judicial Court of Massachusetts recently explained, in holding that a defendant in Petitioner's situation must be permitted to withdraw his plea, despite having been told that deportation was a possibility:

> 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.

Indeed, common sense dictates the same conclusion. The Ninth Circuit very recently

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[12]As the Supreme Court subsequently confirmed, this was a new understanding of what information the noncitizen defendant must receive, necessitated (*Padilla* explained) by the changes that have occurred over the last two decades. See, *Chaidez v. United States*, ___ U.S. ___, 133 S. Ct. 1103, 1110 (2013).

reiterated the cogent remarks made by a jurist in rejecting the argument that a defendant had been adequately advised because he knew that deportation was possible:

> "Well, I know every time that I get on an airplane that it *could* crash, but if you tell me it's *going* to crash, I'm not getting on."

United States v. Rodriguez-Vega, ___ F.3d ___, 2015 U.S. App. LEXIS 14291, *20 [emphasis supplied; citation omitted].

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 lower court's 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; *Ortega-Araiza v. State*, 2014 WY 99, P15-P17, 331 P.3d 1189, 1195-97 (Sup. Ct. Wyo. 2014); *Commonwealth v. DeJesus*, 468 Mass. 178, 181-82 & n. 7; 9 N.E.2d 789, 795-96; *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 Petitioner'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); *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].

As the Ninth Circuit explained, holding that the trial court abused its discretion when it denied the defendant's motion to withdraw his guilty plea:

> 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. There can be little doubt that the district court abused its discretion in concluding that, because Bonilla was willing to enter a plea when he "was at least aware of the possibility of deportation," his counsel's failure to advise him that he would almost certainly be deported did not constitute a "fair and just reason" for the withdrawal of his plea.

> 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.

United States v. Bonilla, 637 F.3d at 984 [citations omitted];[13] *accord, e.g., Ortega-Araiza v. State,* 2014 WY at P15-P17, 331 P.3d at 1195-97 [collecting cases to same effect].

Just as ignorance of the actual immigration consequences of his plea stated a "fair and just reason" for Mr. Bonilla to be permitted to withdraw his plea under the federal rule, Ryan

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[13]The Court of Appeal accuses Petitioner's counsel of a "misleading" reliance on *Bonilla*, a case which the lower court asserts is "distinguishable." (Exh A at 13). The court then proceeds to list various factual details in the cited case that are (perforce) different than the details of the instant case (including that Bonilla's wife had asked the lawyer about immigration consequences, but had not gotten an answer) – but never explains why those facts make the cited case "distinguishable." The lower court concludes by inventing a "quote" from *Bonilla* which does not exist in the Ninth Circuit's opinion, *i.e.*: "Therefore the [Ninth Circuit] 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."'" *Id.* at 15-16, purporting to cite *United States v. Bonilla*, 637 F.3d at 986.

Again, that quotation is not to be found as such in the Ninth Circuit's opinion – rather, it is a paraphrase and (to borrow the lower court's term) a misleading one at that. What the Ninth Circuit actually said was as follows:

> "There can be no question that the immigration consequences about which Bonilla learned after entering a plea 'could have at least plausibly motivated a reasonable person in' the defendant's 'position not to' plead 'guilty. . . .' As Bonilla stated in his declaration, he would at the very least have attempted to negotiate a plea to a lesser offense. In any event, if defense counsel's failure to provide material advice 'plausibly could have motivated his decision to plead guilty, nothing in Rule 11(d)(2)(B) requires a defendant to show more in order to satisfy the "fair and just reason" standard.'"

United States v. Bonilla, 637 F.3d at 986 [citations and internal bracketing omitted]. Petitioner respectfully submits that the actual language, just quoted, is dead on point, and that if the name "Patterson" was substituted for "Bonilla" and "section 1018" replaced "Rule 11(d)(2)(B)" the same analysis would apply quite precisely to the case at bench.

Patterson's undisputed ignorance of *his* "virtually certain" deportation provides "good cause" for withdrawal of his plea under the cognate California rule. This is not to say that the court has a duty to ascertain whether the noncitizen defendant will definitely be deported, and to so inform him before accepting his plea. *See, Giron,* 11 Cal.3d at 797. Rather, it is just to say that, in the new era in which deportation and other catastrophic immigration consequences are the dead certain result of so many pleas, it is only fair and just – and completely in keeping with the liberal intent of section 1018 – to permit a noncitizen defendant to withdraw a plea that he would not have entered but for his ignorance of such critical facts. *See, Giron,* 11 Cal.3d at 797.

C. The Court of Appeal's Opinion Is Premised On A Flat Misreading Of Supreme Court Precedent And Is Logically Insupportable

The Court of Appeal begins the portion of its opinion addressed to the direct appeal as follows: "The People contend that the trial court erred in granting defendant's motion to withdraw his guilty plea and reinstating the criminal proceedings." (Exh. A at 10).

That is of course exactly wrong: the appeal was brought by the defendant (here petitioner) Ron Patterson – *not* "the People" – and it challenged the trial court's *denial* of defendant's 1018 motion. While this error is not particularly important in itself, it is worth noting because it so perfectly foreshadows the analysis that followed, in which the lower court similarly got the holding in *Padilla* precisely backwards and gave a rationale for denying the appeal that was equally insupportable.

The appellate court first observes that Petitioner "initialed and signed" a plea form affirming that he understood "'that this conviction may have the consequences of

deportation, exclusion from admission to the United States, or denial of naturalization . . . .'"

(*Id.* at 11). The opinion continues:

> 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*. . . .
>
> 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*. However, . . . 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. There was no misadvisement in this case. Instead, defendant was fully aware of the immigration consequences.

(Exh. A at 12-13 [emphasis by the Court; citations omitted]

At the heart of the Court of Appeal's analysis is an adamant refusal to accept the teaching and significance of *Padilla* and its progeny. The lower court insists that *Padilla* is limited to holding that a defense attorney cannot provide a noncitizen defendant "misadvice" about the immigration consequences of a proposed plea – but that, so long as the defendant is aware that there *may* be adverse immigration consequences, there is no problem. In fact, the Supreme Court explicitly rejected just such a limitation. *Padilla v. Kentucky*, 559 U.S.

at 369-74. Noting that "[t]he Solicitor General has urged us to conclude that *Strickland* applies to Padilla's claim only to the extent that he has alleged affirmative misadvice" (*id.* at 369), the Court explained that a "holding limited to affirmative misadvice would invite . . . absurd results" (*id.* at 370), and concluded instead that counsel must investigate the immigration effects of the proposed plea and if "the deportation consequence is truly clear, as it was in this case," the defendant must be warned that accepting the plea bargain will automatically result in deportation. *Id.* at 369; see also, *United States v. Bonilla*, 637 F.3d at 983-84 [describing the *Padilla* holding].

The reason underlying the Supreme Court's holding – and the true significance of that holding in the instant case – goes back to the critical distinction between hearing of the possibility of adverse consequences as opposed to being told that the full catastrophe will certainly occur; between knowing that the plane *could* crash and knowing that it definitely will. For the Court of Appeal to say that "defendant was fully aware of the immigration consequences" (Exh. A at 13) moments after admitting that "defendant was not clear what those consequences may be" (*id.* at 12) is both contrary to the essential teaching of *Padilla* and just plain faulty induction.

Simply put: someone who knows the latter – that he *may* be deported – but not the former – that he definitely *will* be deported – is in "ignorance" of facts that are necessary to form the "free and clear judgment" within the meaning of this Court's standard for allowing the withdrawal of his guilty plea under section 1018. *People v. Johnson*, 47 Cal. 4th at 679. The Court of Appeal's odd inability to accept this point – which flows inexorably from the

fundamental insight of *Padilla* – strips the lower court's analysis of persuasive force. Perhaps more to the point: The fact that both lower courts rested their decisions on an outright misinterpretation of pertinent United States Supreme Court precedent renders those decisions an abuse of any discretionary authority those court possessed. See, *In re Tobacco II Cases,*46 Cal. 4th 298, 311 (2009); citing, *People v. Superior Court (Humberto S.),* 43 Cal.4th 737, 746 (2008); and *Linder v. Thrifty Oil Co.,* 23 Cal.4th 429, 435–436 (2000). Accordingly, the decisions below should be reversed.

CONCLUSION

For the reasons set forth above, the judgment should be vacated and the case remanded to the Superior Court with instructions to permit Petitioner to withdraw his guilty plea.

Dated: September 10, 2015

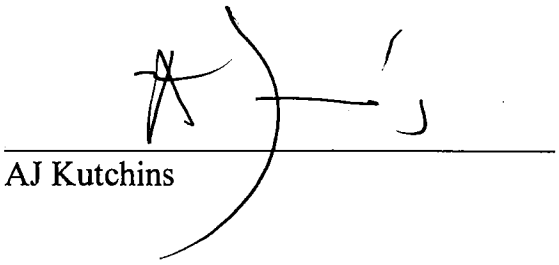
Respectfully submitted,

AJ KUTCHINS
Attorney for Petitioner Ron Douglas Patterson

CERTIFICATION REGARDING LENGTH OF PETITION

Undersigned counsel hereby certifies that the attached Petitioner's Brief on the Merits contains 8,445 words, exclusive of tables, appendices and caption.

Dated: September 10, 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 18, 2015, I served the enclosed Petitioner's Opening Brief in the action entitled *People of the State of California vs. Ron Douglas Patterson,* Supreme Court No. S225193 (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
California Court of Appeal
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside, CA 92501

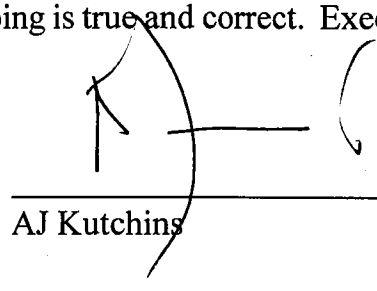
Megan J. Beale
California Deputy Attorney General
110 West A Street, Ste. 1100
San Diego, California 92101

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 September 10, 2015, at Berkeley, California.



AJ Kutchins