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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **RODRIGO MARTINEZ MARTINEZ,** **Defendant and Appellant.**	Case No. S199495

Sixth Appellate District, Case No. H036687
Santa Clara County Superior Court, Case No. ~~156569~~
The Honorable Marc Poché, Judge

ANSWER BRIEF ON THE MERITS

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2. Did the trial court below abuse its discretion in denying appellant's motion to withdraw his 1992 plea?

INTRODUCTION

Appellant pleaded guilty to selling marijuana in 1992. Nearly 20 years later he sought to vacate his plea under Penal Code section 1016.5[1] to avoid negative immigration consequences from the conviction. The trial court denied his motion, and the Court of Appeal affirmed the denial, finding speculative appellant's claim that he would have pleaded to a theoretical alternative deal and concluding that he would have done no better had he chosen his chances at trial. Appellant contends the Court of Appeal erred and asks this Court to modify the prejudice standard for reviewing section 1016.5 claims to reflect the United States Supreme Court's recent decision in *Padilla v. Kentucky* (2010) ___ U.S. ___ [130 S.Ct. 1473] (*Padilla*). Specifically, he argues that the prejudice determination should involve a consideration of speculative factors such as whether the defendant could have obtained an immigration-neutral plea deal or insisted on trial in the face of almost certain conviction.

Contrary to appellant's assertion, *Padilla* does not alter the prejudice analysis for section 1016.5 nonadvisement. We disagree that a prejudice

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[1] All subsequent statutory references are to the Penal Code unless otherwise indicated.

determination must theorize about alternative plea deals or consider the possibility that appellant would have opted for trial despite the overwhelming likelihood of conviction. The Court of Appeal did not err in affirming the trial court's denial of appellant's claim.

STATEMENT OF THE CASE

After an officer testified at the preliminary hearing that he witnessed—from four feet away—appellant sell a Mr. Ryan a usable quantity of marijuana (CT 5-10), the Santa Clara County District Attorney filed an information charging appellant with one count of transporting or selling marijuana in violation of Health and Safety Code section 11360, subdivision (a) (CT 23-24).

On July 28, 1992, appellant pleaded guilty to the charge. (CT 28.) The minute order of the plea has boxes checked for the reading of rights, advisement of maximum time, probation and parole, stipulation to a factual basis, and registration requirements, but not the box which states "advised of immig. status." (CT 28.)[2] The trial court placed appellant on three years' formal probation and imposed a probationary jail term of credit for time served, 111 days. (CT 30.)

On January 18, 2007, appellant filed a motion pursuant to section 1203.4 for record clearance. (CT 31.) On May 25, 2008, the superior court granted appellant's motion and dismissed the case. (CT 36-37.)[3]

On July 24, 2008, appellant applied to the United States Citizenship and Immigration Services for an adjustment of status to lawful permanent

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[2] Because of the passage of time, the reporter's notes and transcript of the plea are no longer available. (See CT 51.)

[3] An order of a California state court expunging an individual's state conviction pursuant to section 1203.4 does not eliminate the federal immigration consequences of the conviction. (*Ramirez-Castro v. I.N.S.* (9th Cir. 2002) 287 F.3d 1172, 1174-1175.)

residency. (CT 81, 86.) On July 16, 2009, his application was denied for a violation "relating to Controlled Substances Act." (CT 81, 86.) On January 21, 2011, appellant filed a motion to vacate his 1992 conviction pursuant to section 1016.5. He asserted that had he been aware that by pleading guilty he would become deportable and permanently barred from the United States as a lawful permanent resident, he would not have pleaded guilty, but would have instead either insisted on a plea agreement without the negative immigration consequences or exercised his right to jury trial. (CT 45.)

The court held a hearing on February 15, 2011 (see 1 RT 3-11), and on February 17, 2011, denied the motion, finding that appellant established that the advisement regarding immigration consequences was not given before he entered his plea and that the conviction may have one of the adverse immigration consequences specified in the statute, but failed to establish that he was prejudiced by the lack of advisement. Given the weight of the evidence, the court found it "highly improbable" that appellant would have been offered a plea agreement "'that would have spared him such immigration damage'" or, in the alternative, would have chosen and been successful at trial. (CT 91-92.)

The Court of Appeal affirmed the trial court's decision, finding appellant's claim speculative and unreasonable. This Court granted appellant's petition for review.

SUMMARY OF ARGUMENT

The Legislature enacted section 1016.5 to protect defendants by ensuring that they are apprised of the potential immigration consequences of a proposed disposition before pleading guilty or no contest. A defendant who moves to withdraw his plea under subdivision (b) of section 1016.5 must demonstrate he was not so advised, a more than remote possibility existed at the time of the motion that the conviction may indeed cause him

to suffer adverse immigration consequences, and he was prejudiced by the failure to advise. (*People v. Totari* (2002) 28 Cal.4th 876, 884.)

Prejudice from a section 1016.5 nonadvisement must be shown by demonstrating that "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; *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).) A defendant's assertion that he would not have pleaded guilty if properly advised "must be corroborated independently by objective evidence." (*In re Alvernaz* (1992) 2 Cal.4th 924, 938 (*Alvernaz*).)

Similarly, to prevail on a claim of ineffective assistance of counsel in the plea context, the defendant must show a reasonable probability that he would not have accepted the offered plea deal and instead would have insisted on proceeding to trial. (*Hill v. Lockhart* (1985) 474 U.S. 52 (*Hill*); *In re Resendiz* (2001) 25 Cal.4th 230 (*Resendiz*), disapproved on another ground in *Padilla*, *supra*, 130 S.Ct. 1473.) *Hill* and *Resendiz* do not compel consideration of factors such as whether the defendant could have obtained a different plea deal or insisted on trial in the face of almost certain conviction. Nor has *Padilla* altered the prejudice prong of the ineffective assistance of counsel analysis to consider these factors. Indeed, the United States Supreme Court has recently affirmed that *Hill* provides "the appropriate standard for prejudice in cases involving plea bargains" in which the defendant claims inefficient assistance of counsel. (*Premo v. Moore* (2011) ___ U.S. ___, ___ [131 S.Ct. 733, 745].)

Recently, the United States Supreme Court held in *Padilla*, *supra*, 130 S.Ct. at page 1473, that defense counsel must advise noncitizen clients

about the deportation risks of a guilty plea.[4] *Padilla* explicitly did not assess prejudice but rather favorably cited *Hill*.

Appellant now "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*"; specifically, "the prejudice inquiry should be whether a rational person would have rejected a particular plea." (Opening Brief at pp. 9, 12.) We disagree that *Padilla* created a new test for prejudice.

First, *Padilla*'s analysis is focused explicitly on the performance prong of an ineffective assistance of counsel determination under *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*). Second, no stretch of the imagination can transform *Padilla*'s observation that a defendant must show that "a decision to reject the plea bargain would have been rational under the circumstances" (*Padilla*, *supra*, 130 S.Ct. at p. 1485) into a replacement of the *Hill* prejudice standard. This has since been made clear by the United States Supreme Court's reaffirmation of *Hill* as providing "the appropriate standard for prejudice in cases involving plea bargains." (*Premo v. Moore*, *supra*, 131 S.Ct. at p. 745.) Third—although *Zamudio*'s prejudice test is functionally similar to the prejudice determination for ineffective assistance of counsel under *Hill* and *Resendiz*—nothing compels this Court to import federal constitutional protections of the right to counsel into a purely statutory state prejudice determination subject to *Watson* review.

The *Zamudio* prejudice test has not been affected by *Padilla*. Rather, in light of recent United States Supreme Court opinions discussed below, it

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[4] The issue of whether *Padilla* created a new rule and is to be applied retroactively is currently pending before the United States Supreme Court. (See *Chaidez v. United States* (7th Cir. 2011) 655 F.3d 684, cert. granted Apr. 30, 2012, ___ U.S. ___ [132 S.Ct. 2101].)

has been clarified to assess whether there is a reasonable probability that a properly advised defendant would have rejected the plea deal that had been offered to him and chosen to go to trial. In conducting this analysis, courts may consider the defendant's likelihood of success at trial but not any alternative plea deals that may have been—but were not—offered to him. This is the test correctly used by the Court of Appeal below to deny appellant's claim.

Appellant, moreover, does not satisfy his own proposed test because his claim rests on the speculative assumption that "[a]n immigration-neutral alternative plea was reasonably available" to him. (Opening Brief at p. 28.) However, he neglects to recognize that federal immigration courts may look beyond the elements of his plea and review the record of conviction. He has not established that immigration consequences could have been avoided with a plea to a different offense.

Even if this Court concludes a court hearing a motion to withdraw a plea pursuant to section 1016.5 must consider potential immigration-neutral plea dispositions or a defendant's preference for trial despite almost certain conviction when assessing prejudice, the burden of making that showing must fall on the defendant challenging the plea. Respect for judgment finality and the independence of the branches of government demand that the defendant affirmatively demonstrate—not merely assume as he does here—either (1) a prosecutorial willingness at the time of the plea to offer him an opportunity to plead guilty to an immigration-neutral offense, the existence at that time of an immigration-neutral offense supported by a factual basis, and a likelihood the court would have approved the alternative plea agreement, or (2) objective evidence that he would have gone to trial regardless of the certainty of conviction. (See *Alvernaz*, *supra*, 2 Cal.4th at pp. 941, 945.)

Here, appellant has provided no objective evidence concerning any of these prerequisites, other than his self-serving (and therefore inadequate) assertion that he would have preferred his chances at trial, slim as they were. The trial court did not err in denying appellant's section 1016.5 motion.

ARGUMENT

I. PREJUDICE UNDER SECTION 1016.5, SUBDIVISION (b) REQUIRES PROOF OF A REASONABLE PROBABILITY APPELLANT WOULD NOT HAVE ENTERED HIS PLEA AND INSTEAD WOULD HAVE GONE TO TRIAL HAD HE BEEN ADVISED OF IMMIGRATION CONSEQUENCES

Prejudice from nonadvisement under section 1016.5 must be shown by demonstrating that "it is 'reasonably probable' the defendant would not have pleaded guilty if properly advised" (*Zamudio*, *supra*, 23 Cal.4th at p. 210, citation omitted; see also *Watson*, *supra*, 46 Cal.2d at p. 836), a standard functionally similar to the showing of prejudice required to prove ineffective assistance of counsel (*Hill*, *supra*, 474 U.S. at p. 59 [defendant must show a reasonable probability that, but for counsel's error "he would not have pleaded guilty and would have insisted on going to trial"]). In conducting this analysis, a trial court may consider likelihood of success at trial but may not consider factors such as whether the defendant could have obtained an immigration-neutral plea deal or insisted on going to trial despite almost certain conviction. This analysis respects prosecutorial and judicial independence and reflects the importance of plea finality. *Padilla*, *supra*, 130 S.Ct. 1473 has not changed this analysis.

If this Court concludes that alternative dispositions should be considered in the section 1016.5 prejudice analysis, appellant must bear the burden of presenting objective evidence demonstrating that he would not have accepted the offered plea. (*Alvernaz*, *supra*, 2 Cal.4th at p. 945.)

A. Section 1016.5

Section 1016.5, subdivision (a), requires that prior to the acceptance of a guilty plea to any crime except infractions, the court shall advise the defendant: "If you are not a citizen, . . . conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States."

Subdivision (b) of section 1016.5 further provides that if the court fails to so advise the defendant and the defendant shows that the conviction may have the consequences of deportation, exclusion from the admission to the United States, or denial of naturalization, the court on the defendant's motion shall vacate the judgment and permit the defendant to withdraw the plea of guilty. It further provides, "Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement."

This Court has held that to prevail on a motion brought pursuant to section 1016.5, subdivision (b) the defendant must establish that (1) he was not properly advised of the immigration consequences, (2) there existed, at the time of the motion, more than a remote possibility that the conviction would have one or more of the specified adverse immigration consequences, and (3) he was prejudiced by the failure to advise. (*People v. Totari*, *supra*, 28 Cal.4th at p. 884.)

As a general matter, reasonable probability of obtaining "a result more favorable to the appealing party . . . in the absence of the error" is the test California courts use to determine prejudice from the erroneous application of state procedural requirements. (*Watson*, *supra*, 46 Cal.2d at p. 836.) To show prejudice under section 1016.5, a moving party must establish that it is reasonably probable he would not have pleaded guilty if properly advised. (*People v. Totari*, *supra*, 28 Cal.4th at p. 884; *Zamudio*, *supra*, 23

Cal.4th at pp. 192, 199-200, 209-210; *People v. Dubon* (2001) 90 Cal.App.4th 944, 951-952.)

As discussed below, the prejudice determination must ask whether there is a reasonable probability that a properly advised defendant would have rejected the plea deal that was offered to him and chosen to go to trial. In conducting this analysis, courts may consider the defendant's likelihood of success at trial but not any alternative plea deals that could have been—but were not—offered to him.

B. *Hill*'s Test Is Instructive in Section 1016.5 Prejudice Determinations

Although legislatively created rights are purely statutory creatures and do not implicate federal constitutional protections (see *People v. Epps* (2001) 25 Cal.4th 19, 29; see also *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1190), the prejudice inquiry "[i]n many guilty plea cases . . . will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial," that is whether "counsel's constitutionally ineffective performance affected the outcome of the plea process" (*Hill*, *supra*, 474 U.S. at p. 59). Clarifying treatment of the *Hill* test is illuminating in section 1016.5 prejudice determinations as well.

Two options are available to most defendants: enter a guilty plea or go to trial. Although the vast majority of cases are resolved by plea bargaining (*Blackledge v. Perry* (1974) 417 U.S. 21, 37), there is no constitutional right to a plea bargain (*Weatherford v. Bursey* (1977) 429 U.S. 545, 561).

Hill explained that in plea cases, requiring defendants seeking to withdraw their pleas to make a prejudice showing

> serve[s] the fundamental interest in the finality of guilty pleas we identified in *United States v. Timmreck*, 441 U.S. 780 (1979):

> "Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea."

(*Hill*, *supra*, 474 U.S. at p. 58, citations and internal quotation marks omitted.)

Therefore, "in order to 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." (*Hill*, *supra*, 474 U.S. at p. 59.)

This Court has applied *Hill*'s "reasonable probability" test to *Strickland* claims and clarified that in determining whether a defendant would have accepted a specific plea offer, pertinent factors to be considered include: "the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain." (*Alvernaz*, *supra*, 2 Cal.4th at p. 938.)

A defendant's chance of success at trial is a good yardstick for determining whether there is a reasonable probability the defendant would not have pleaded guilty and would have insisted on going to trial. "In 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." (*Resendiz*, *supra*, 25 Cal.4th at p. 254.)

In *Resendiz*, the petitioner, a lawful permanent resident of the United States, pleaded guilty to possession for sale of cocaine and marijuana and

possession of a usable amount of methamphetamine. He was advised of potential immigration consequences of his plea. The court suspended imposition of sentence and conditioned three years' probation on serving 180 days in jail. After the petitioner complied with his jail term, federal authorities initiated deportation proceedings against him. (*Resendiz*, *supra*, 25 Cal.4th at pp. 235-236.) The petitioner moved to vacate his plea, claiming that his counsel had told him that he would have "'no problems with immigration'" and that he misunderstood the court advisement. (*Id.* at pp. 236-237.) He further contended that he told his attorney that he was innocent and that he decided to plead guilty after the attorney told him he would be sentenced to five years if he did not plead. He claimed that he would not have pleaded guilty if he had known that he would be deported and that he was willing at the time of the motion to face the possibility of trial followed by the maximum possible sentence, five years four months. (*Id.* at p. 237.)

Relying on *Hill*, *supra*, 474 U.S. at pages 58-59 and *Alvernaz*, *supra*, 2 Cal.4th at pages 933-934, this Court assessed prejudice by looking at whether "a reasonable probability exists that, but for counsel's incompetence, [the petitioner] would not have pled guilty and would have insisted, instead, on proceeding to trial." (*Resendiz*, *supra*, 25 Cal.4th at p. 253.) The Court found that the petitioner had not met his burden to adduce "any substantial evidence suggesting the prosecutor might ultimately have agreed to a plea that would have allowed petitioner to avoid adverse immigration consequences." (*Id.* at p. 254.) Furthermore, the choice petitioner faced at the time he was considering his plea "would *not* have been between, on the one hand, pleading guilty and being deported and, on the other, going to trial and avoiding deportation. While it is true that by insisting on trial petitioner would for a period have retained a theoretical possibility of evading the conviction that rendered him deportable and

excludable, it is equally true that a conviction following trial would have subjected him to the same immigration consequences. [¶] . . . [N]othing in his declaration or the other evidence he offered indicates how he might have been able to avoid conviction or what specific defenses might have been available to him at trial." (*Ibid.*)

Although ensuring effective assistance of counsel for defendants is constitutionally mandated whereas the directive to instruct defendants pursuant to section 1016.5 is a state statutory requirement, the *Zamudio* prejudice test is functionally similar to the prejudice determination for ineffective assistance of counsel. Accordingly, factors that the United States Supreme Court has deemed pertinent to a *Strickland* prejudice analysis are useful in the prejudice analysis of a section 1016.5 motion.

C. *Padilla* Does Not Affect the *Hill* Prejudice Analysis

In 2010, the United States Supreme Court recognized that defense counsel has an obligation to warn his client about deportation consequences of a criminal conviction. (*Padilla*, *supra*, 130 S.Ct. at p. 1478.) It cited *Hill* and *Strickland* before noting that "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." (*Id.* at p. 1485.) Appellant contends this language created a new "rational under the circumstances" test that replaced *Hill*'s "reasonably probable" test. (Opening Brief at p. 15.) This contention is undermined both by *Padilla*'s own language and by the Supreme Court's subsequent opinions.

First, *Padilla* did not analyze whether the defendant suffered prejudice. The Court did, however identify *Hill* as the governing standard in a prejudice analysis. Second, the Supreme Court has recently shed further light on this paradigm by circumscribing the factors considered by a court retroactively reviewing a plea choice for prejudice.

In 2011, the Supreme Court reaffirmed the *Hill* test and explicitly disapproved a Ninth Circuit concurring opinion that, like appellant, attempted to modify the *Hill* test to find prejudice where "there was a reasonable probability that [the defendant] would have obtained a better plea agreement but for his counsel's errors." (*Premo v. Moore*, *supra*, 131 S.Ct. at pp. 743, 745 [rejecting the approach proffered by Judge Berzon's concurring opinion in *Moore v. Czerniak* (9th Cir. 2009) 574 F.3d 1092, 1130-1133].) *Premo* reiterated that the question in such cases is whether the defendant "established the reasonable probability that he would not have entered his plea but for his counsel's deficiency," and that the appropriate standard for determining this question "was established in *Hill*, which held that a defendant who enters a plea agreement must show 'a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.'" (*Id.* at p. 745.) The Court's insistence on restating the *Hill* test time and again—before and after *Padilla*—reflects its rejection of "[h]indsight and second guesses" (*ibid.*) and its respect for judgment finality. "The plea process brings to the criminal justice system a stability and a certainty that must not be undermined by the prospect of collateral challenges in cases not only where witnesses and evidence have disappeared, but also in cases where witnesses and evidence were not presented in the first place." (*Id.* at pp. 745-746.)

The next term brought the twin decisions of *Lafler v. Cooper* (2012) ___ U.S. ___ [132 S.Ct. 1376] (*Lafler*), and *Missouri v. Frye* (2012) ___ U.S. ___ [132 S.Ct. 1399] (*Frye*), in which the Supreme Court addressed situations where a defendant seeks a remedy when inadequate assistance of counsel caused the rejection of a plea offer and further proceedings led to a less favorable outcome.

In *Frye*, the defendant was charged with driving with a revoked license. Because he already had three convictions of the same offense, he

was facing a four-year prison term. The prosecution offered him two possible plea bargains, including pleading to a misdemeanor and serving a 90-day sentence, neither of which his counsel conveyed to him. He subsequently pleaded guilty without a plea agreement and was sentenced to a three-year term. (*Frye*, *supra*, 132 S.Ct. at p. 1401.) The Supreme Court held:

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

(*Id.* at p. 1409.)

Broadcasting its reluctance to retroactively second-guess plea negotiations, the court reiterated that the showing that "there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented . . . is of particular importance because a defendant has no right to be offered a plea, see *Weatherford*, 429 U.S., at 561, 97 S.Ct. 837, nor a federal right that the judge accept it, *Santobello v. New York,* 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)." (*Frye*, *supra*, 132 S.Ct. at p. 1410.)

Lafler, *supra*, 132 S.Ct. 1376 was decided the same day as *Frye*. Because of the admitted incompetence of counsel, the prosecution's offer was not communicated to the defendant, who then went to trial and received a sentence longer than the prosecution's offer. The court held that when deficient performance by counsel results in a rejected plea offer, the

defendant must show "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court . . . , that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." (*Id.* at p. 1385.)

Notably—and in sharp contrast to appellant's proposal—*Frye* and *Lafler* both concern plea choices that had already been formulated and offered by the prosecution. Even so, the court required the defendant to show a reasonable probability that the prosecutor or trial court would not have canceled the plea and that the outcome of the alternative would have been less severe than appellant's actual outcome.

Appellant relies on footnote 10 in *Vartelas v. Holder* (2012) ___ U.S. ___, ___ [132 S.Ct. 1479, 1492] in which the court observed that a defendant who knows "that a guilty plea would preclude travel abroad . . . might endeavor to negotiate a plea to a nonexcludable offense . . . or exercise a right to trial" to contend that "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." (Opening Brief at p. 21.) However, *Vartelas* addressed whether to interpret an immigration reentry limitation as prospective only, and thus the plea bargain considerations identified in footnote 10 are merely generalized considerations that militate against disturbing established expectations and detrimental reliance. *Vartelas* did not suggest such factors should be incorporated into the *Hill* test. Furthermore, while it noted that a defendant "might endeavor to negotiate" a different plea, it did not impose an obligation on the prosecutor or trial court to engage in creative plea bargaining to evade federal immigration consequences.

So too in the section 1016.5 context, should the prosecutor wish to offer a plea, such an offer need not take into account avoiding immigration consequences. Nor is a court required to approve such a plea. No precedent requires or even suggests that the reviewing court must suspend its judicial function and put on a prosecutorial hat to delve into possible plea deals that should be made available to the defendant.

D. The Section 1016.5 Prejudice Analysis Is Cabined by the Existing Options Available to the Defendant at the Time of the Plea

Hill, *Alvernaz*, and *Resendiz* illuminate the type of prejudice analysis courts must engage in when considering a section 1016.5 motion to vacate the judgment. The focus is on the binary choice faced by the defendant at the time he is entitled to receive the immigration warning—a warning only given once the defendant has decided to enter a guilty or no contest plea: either proceed with his intended plea or exercise the right to go to trial. A section 1016.5 advisement does not change the nature of defendant's choice by altering these options. That is, the advisement does not create an entitlement to other *possible* immigration-neutral plea offers that *could have been—but were not*—made by the prosecution and approved by the court. Nor could the advisement alter the reasonable probability a defendant would choose trial given the likelihood of success at trial.

Rather, a section 1016.5 prejudice analysis must focus on whether a reasonable probability existed that a properly advised defendant viewing his actual options at the time of the advisement would reject his outstanding plea offer and choose trial given the perceived likelihood of success there. The choice faced by a defendant—even one who "may view immigration consequences as the only ones that could affect his calculations regarding the advisability of pleading guilty"—is between accepting the existing plea offer or rejecting it and proceeding to trial. (See *Resendiz*, *supra*, 25

Cal.4th at pp. 253-254.) Thus, the focus is on "the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer." (*Alvernaz*, *supra*, 2 Cal.4th at p. 938.) In this context, the only plea options relevant for consideration are ones actually offered by the prosecution. The reasonableness of the option to choose trial is measured by the likelihood of success there.

Fry and *Lafler* suggest that available plea offers in the related context of ineffective assistance of counsel are plea offers that have been made by the prosecution, have not expired or been cancelled, and would be approved by the trial court. Thus, the determination of whether the defendant would have pleaded guilty after the advisement contemplates *active* plea offers within that definition.

A consideration of theoretical possible alternative plea bargains is barred. *Premo* explicitly rejected considering whether "there was a reasonable probability that [a defendant] would have obtained a better plea agreement but for his counsel's errors." (*Premo v. Moore*, *supra*, 131 S.Ct. at pp. 743, 745.) Nothing compels such a consideration in section 1016.5 prejudice assessment.

The likelihood of success at trial is a useful yardstick for determining whether it was reasonably probable that a properly advised defendant would opt for trial because losing at trial would subject the defendant to the same immigration consequences as entering the plea. (See *Resendiz*, *supra*, 25 Cal.4th at p. 254 [the choice petitioner faced at the time he was considering his plea "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 only thing a defendant would typically "gain" in such a situation is a longer sentence or more convictions *in addition* to the immigration consequences. Therefore, it would be unreasonable for a

defendant to choose trial that would most likely result in his conviction. Thus, to establish prejudice in section 1016.5 nonadvisement claims, the defendant must show a reasonable probability that the end result of the criminal process would have been more favorable to him in terms of immigration consequences (see *Lafler*, *supra*, 132 S.Ct. at p. 1385), that is that there is a reasonable probability that he would not have been convicted at trial of an offense that had immigration consequences.

Appellant places undue emphasis on *Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1245, a Court of Appeal decision that did not consider likelihood of success at trial in its prejudice determination. (Opening Brief at p. 14.) *Castro-Vasquez*, decided before *Padilla*, discussed *Resendiz* as "not hold[ing] that prejudice must be established by showing the probable favorable outcome of any trial; [but] merely suggest[ing] that the probable outcome of a trial was one factor a court could consider in assessing the likelihood that a defendant would have rejected a plea offer." (*Castro-Vasquez*, *supra*, at p. 1245.) On the specific facts before it, *Castro-Vasquez* found "no need to consider this or any other factor, because the trial court accepted appellant's representation that had he been properly advised, he would not have pled guilty." (*Ibid.*) Relying on *Totari*, *Zamudio*, and *Resendiz*, the Court of Appeal arrived at the uneventful conclusion that "once the [trial] court accepted appellant's assertion that he would not have pled guilty had he been advised of the immigration consequences, prejudice was established and appellant had satisfied all three requirements for prevailing on a motion made pursuant to section 1016.5." (*Id.* at p. 1246.) *Castro-Vasquez* is limited to its facts and, at any rate, did not suggest what factors the trial court may have (or should have) considered in accepting appellant's assertion.

Thus, neither theoretical alternative plea offers that a defendant with hindsight believes could have been obtained nor the unreasonable

possibility of proceeding to trial despite the overwhelming likelihood of conviction is a proper subject for the prejudice analysis.

E. Considering Factors Other than Probable Success at Trial to Determine Whether There Was a Reasonable Probability the Defendant Would Not Have Pleaded Guilty and Chosen Trial Would Undermine Prosecutorial and Judicial Independence

Appellant argues that a section 1016.5 prejudice analysis should consider factors such as the possibility that a properly advised defendant might obtain an immigration-neutral plea bargain or prefer trial whatever his chances. This would amount to a virtual elimination of a prejudice requirement for section 1016.5 claims and undermine judgment finality and separation of powers.

Charging decisions are generally within the prosecutor's exclusive domain, and the separation of powers doctrine mandates the prosecutor's independence.

"[T]he process of plea negotiation contemplates an agreement negotiated by the People and the defendant and approved by the court." (*People v. Segura* (2008) 44 Cal.4th 921, 929-930, citations and quotation marks omitted.) "[O]nly the prosecutor is authorized to negotiate a plea agreement on behalf of the state." (*Id.* at p. 930.) California case law has never required reading the mind of the prosecutor and presuming the existence of a favorable plea deal. The prosecution, not the defendant, is the party responsible for determining the charges. (*People v. Birks* (1998) 19 Cal.4th 108, 128.)

> The California Constitution (art. III, § 3) provides that "[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

> It is well settled that the prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring. [Citations.] This prosecutorial discretion to choose, for each particular case, the actual charges from among those potentially available arises from "'the complex considerations necessary for the effective and efficient administration of law enforcement.'" [Citations.] The prosecution's authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch. [Citations.]

(*Id.* at p. 134.)

Thus, appellant's proposal that the reviewing court consider whether he could have pleaded guilty to other, immigration-neutral charges is unsupported by the law. A court may not add or substitute charges in the prosecutor's charging document. It is "*a power that resides exclusively with the prosecution.*" (*People v. Birks*, *supra*, 19 Cal.4th at p. 135.) Indeed, "separation of powers difficulties may arise . . . from a constitutional interpretation that requires a *judicial* officer, acting at the defendant's unilateral insistence, to *add* lesser nonincluded offenses which the prosecution has chosen to withhold in the exercise of its charging discretion, and to which it objects." (*Id.* at p. 136.)[5]

Furthermore, appellant's proposed prejudice test is premised on a faulty assumption that the prosecutor must be amenable to offer immigration-neutral plea options. (See Opening Brief at pp. 22-24 [citing current district attorney's memorandum opining that negotiations taking

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[5] The related question of what actions by the trial court constitute an unlawful judicial plea bargain rather than a lawful indicated sentence is presently pending before this Court in *People v. Clancey*, review granted April 11, 2012, S200158.

into account immigration consequences "would be legal and proper"].)[6] This is problematic. First, as previously noted, defendants do not have a constitutional right to a plea bargain. (*Weatherford v. Bursey*, *supra*, 429 U.S. at p. 561.) A prosecutor has no duty to avoid federal immigration consequences. Some prosecutors may be aware of the immigration consequences of a bargain and believe those consequences to be important for the protection of the public.

Indeed, appellant's citation to the written policies of two counties highlights another flaw in his approach. It raises the specter that his proposed prejudice analysis—based on alternative-plea possibilities—would vary county by county and depend on whether the district attorney's office had a stated policy and whether that policy was favorable or unfavorable to adjusting charges and pleas to accommodate immigration consequences.

Nor can the trial court's role in approving a plea bargain be ignored. "Judicial approval is an essential condition precedent to the effectiveness of the bargain worked out by the defense and prosecution." (*People v. Segura*, *supra*, 44 Cal.4th at p. 930, citations and internal quotation marks omitted.) "[T]he trial court may decide not to approve the terms of a plea agreement negotiated by the parties. If the court does not believe the agreed-upon

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[6] Respondent notes that, as of August 6, 2012, the website address for the Los Angeles County District Attorney policies cited by appellant does not bring up the referenced policy. Furthermore, appellant's reliance on policies and practices implemented by Santa Clara District Attorney Jeffrey Rosen is misplaced. Not only are those policies not part of the record, they were implemented by a district attorney who took office over 18 years after the plea deal at issue in this case, and therefore have no relevance to the plea practices in place at the time the actual plea offer here was made and accepted. Furthermore, these policies are not mandated by *Padilla*, which imposes no duty to consider immigration consequences on prosecutors.

disposition is fair, the court need not approve a bargain reached between the prosecution and the defendant, but it cannot change that bargain or agreement without the consent of both parties." (*Ibid.*, citations and internal quotation marks omitted). Court "'approval is an essential condition precedent to any plea bargain' negotiated by the prosecution and the defense, and a plea bargain is ineffective unless and until it is approved by the court." (*Alvernaz*, *supra*, 2 Cal.4th at p. 941.) "In exercising their discretion to approve or reject proposed plea bargains, trial courts are charged with the protection and promotion of the public's interest in vigorous prosecution of the accused, imposition of appropriate punishment, and protection of victims of crimes." (*Ibid.*)

Appellant asks this Court to adopt a "Hail Mary" test, for he suggests a standard whereby prejudice is presumed if there is any possibility—however remote—of an alternative plea that might have been approved or the defendant might have chosen his luck at trial despite the overwhelming likelihood of conviction. That approach to prejudice is unsupported by state or federal precedent, violates the principles of separation of powers and respect for plea finality, and essentially eviscerates the prejudice requirement. Viewed against the backdrop of the realities of the criminal justice system, it is less a test than a series of guesses.

On the other hand, success at trial is an appropriate yardstick for whether it was reasonably probable appellant would have rejected the plea offer had he been advised pursuant to section 1016.5. As previously noted, the choice appellant faced at the time he was considering whether to accept the plea offer "would *not* have been between, on the one hand, pleading guilty and being deported and, on the other, going to trial and avoiding deportation. While it is true that by insisting on trial petitioner would for a period have retained a theoretical possibility of evading the conviction that rendered him deportable and excludable, it is equally true that a conviction

following trial would have subjected him to the same immigration consequences. [¶] . . . [N]othing in his declaration or the other evidence he offered indicates how he might have been able to avoid conviction or what specific defenses might have been available to him at trial." (*Resendiz*, *supra*, 25 Cal.4th at p. 254.)

The probable outcome of a trial is thus the best reflection of what a reasonable person in appellant's position would have done. Pitting the choice of opting for trial despite the almost-certain probability of conviction against entering a guilty plea does not remove the immigration consequence that would follow either choice. And there was an extremely high likelihood of conviction. An officer testified that he clearly observed appellant—only four feet away—selling drugs to Ryan. Appellant has not identified how he might have been able to avoid conviction. To the extent appellant could have hoped to be acquitted in spite of his guilt, this position lacks support. (*Strickland*, *supra*, 466 U.S. at pp. 694-695 ["a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency"].)[7]

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[7] This Court has previously recognized that potentially harsh consequences for an individual defendant should not guide the Court's

(continued...)

F. If a Prejudice Determination Pursuant to Section 1016.5, Subdivision (b) Requires Consideration of Theoretical Alternative Bargains, the Moving Defendant Bears the Burden of Demonstrating That, Had He Been Advised of Immigration Consequences, It Is Reasonably Probable He Would Have Obtained an Immigration-Neutral Plea Deal

Appellant proposes that, rather than rely on the probability of success at trial in assessing whether it is reasonably probable he would have rejected the plea, this Court should consider whether he could have insisted on negotiating another plea or taking his chances at trial. (Opening Brief at p. 14.) Appellant's proposal that the trial court must presume that an alternative immigration-neutral plea acceptable to the appellant would have been available, offered by the prosecution, and approved by the court must be rejected. We do not favor adoption of such an approach because it would essentially consist of appraising of imponderables: Could another charge be supported by the factual basis? Could the practice of the district attorney's office at the time of the plea have contemplated taking immigration consequences into account? Could the prosecutor have deemed the factual basis sufficient to support a different offer? Were there other factors affecting the prosecutor's charging and plea offer decisions? If an immigration-neutral plea deal was struck, would the court have rejected the deal? What was the practice of the court accepting the plea?

(...continued)
articulation of a test with wide-ranging implications. (*People v. Villa* (2009) 45 Cal.4th 1063, 1075 ["We appreciate that the consequences for Villa on the facts of this case seem harsh and that '[a]lthough deportation is not technically a criminal punishment, it may visit great hardship on the alien. . . .' This complaint, however valid, is more appropriately directed to the federal authorities . . . [or] to the Legislature . . . . As a final avenue of relief, Villa can seek a pardon from the Governor. [Citation.] We understand that these meager options may be cold comfort for him, but their negligible nature does not convince us we should alter the law . . . .")

How did the court conceive of its role as protector of the public interest? Appellant wishes to dispose of these and other unknowables with the simple presumption that an immigration-neutral plea was available and would have been offered by the prosecutor and approved by the judge. This is not the test, nor should it be.

Should the Court adopt any prejudice inquiry in addition to whether appellant would have been successful at trial, appellant's claim must be subjected to evidentiary scrutiny. To avoid the separation of powers problems detailed above, this test's viability rests on placing the burden of proof on the shoulders of the moving party, requiring the defendant to produce—in addition to his self-serving declaration that with an advisement he would have chosen to continue with plea negotiations or trial—objective, independent evidence (*Alvernaz*, *supra*, 2 Cal.4th at pp. 938-939) that the prosecutor would have extended an immigration-neutral plea offer (assuming an immigration-neutral offense was available and supported by the factual basis), that the defendant would have accepted it, and that the court would have approved it. It cannot be assumed a trial court would participate in a plan to conceal the facts of defendant's crime from the federal authorities in order to aid a defendant's evasion of a federal policy aimed at individuals trafficking in controlled substances. "A contrary holding would lead to an unchecked flow of easily fabricated claims" (*Alvernaz*, *supra*, 2 Cal.4th at pp. 938-939) and violate prosecutorial and judicial independence.

Appellant in his brief assumes the existence all of the factors. But to make the necessary showing while maintaining respect for plea finality and separation of powers of the branches of government, the moving defendant must affirmatively demonstrate their existence. As this Court made clear, even where a plea had already been offered by the prosecution, "[t]o establish prejudice, a defendant must prove there is a reasonable probability

that, but for counsel's deficient performance, the defendant would have accepted the proffered plea bargain and that in turn it would have been approved by the trial court." (*Älvernaz*, *supra*, 2 Cal.4th at p. 937.)

Respondent submits that a retroactive recalibration of plea options is barred. However, should courts be directed to consider the availability of alternative plea options as a factor in assessing prejudice, then they must do so in the proper evidentiary framework.

A defendant wishing to withdraw his guilty plea because of nonadvisement under section 1016.5 should bear the burden of showing that an immigration-neutral plea offer was available, that the prosecutor would have made such a plea offer, that appellant would have accepted it, and that the court would have approved it.

II. THE TRIAL COURT AND COURT OF APPEAL CORRECTLY REJECTED APPELLANT'S CLAIM

Appellant has failed to demonstrate that it was reasonably probable that he would not have pleaded guilty if properly advised pursuant to section 1016.5. Appellant had not been extended any alternative plea deals. Evidence of his guilt was overwhelming. It was not likely he would have been successful at trial. The trial court did not err in denying appellant's section 1016.5 motion, and the Court of Appeal correctly upheld that decision.

Furthermore, appellant has failed to meet his own suggested test. He has provided no objective evidence that an immigration-neutral offense supported by a factual basis was available, that the prosecutor was willing to offer him an immigration-neutral plea deal, or that the court would have approved an immigration-neutral plea.

A. The Court of Appeal Properly Upheld the Trial Court's Prejudice Assessment

"An order denying a section 1016.5 motion will withstand appellate review unless the record shows a clear abuse of discretion." (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1517.) "An exercise of a court's discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest miscarriage of justice constitutes an abuse of discretion." (*Id.* at p. 1518.)

As previously discussed, a defendant's chance of success at trial is a proper factor for assessing whether there is a reasonable probability the defendant would not have pleaded guilty and insisted on going to trial. *Padilla* has not changed this and the courts below properly applied this standard to appellant's situation.

1. The Trial Court and Court of Appeal Opinions

Appellant pleaded guilty in July 1992. He did not bring the motion to vacate the plea until nearly 20 years later, in 2011. Given the inordinate lapse of time, the only record remaining is the clerk's court minutes and the preliminary hearing transcript. (See Gov. Code, § 68152 [permitting the trial court clerk to destroy court records and reporting notes in certain felonies after five to ten years after proper notice].) In the court minutes of the change of plea, a box after which is stated "advised of immig. status" is not checked. (CT 28.) As a result, the trial court found that appellant could rely on a rebuttable presumption that the advisement regarding immigration consequences was not given before he entered his plea, pursuant to subdivision (b) of section 1016.5. (CT 91.) The trial court also found that appellant had shown that there exists more than a remote possibility that the conviction will have one or more of the adverse immigration consequences specified in the statute. (CT 91-92.) However, the court rejected

appellant's claim that had he been aware of the immigration consequences, he would not have entered the plea. (CT 92.)

The Court of Appeal agreed with the trial court:

> We agree with the trial court that the appellant's claim that he would have plead 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 had 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.

(Slip. Opn. at p. 2.)

2. The Court of Appeal Properly Assessed Prejudice

Appellant had the duty to demonstrate that, had different advice been given, he would have rejected his plea and proceeded to trial. (See *Lafler v. Cooper*, *supra*, 132 S.Ct. at p. 1384; *Resendiz*, *supra*, 25 Cal.4th at p. 253; *Alvernaz*, *supra*, 2 Cal.4th at p. 938.)

Given the record, the trial court did not abuse its discretion. Despite appellant's attempt to paint the prosecution case as "weak," the record shows the opposite. The undercover officer that witnessed the sale was only four feet away from appellant and Ryan when the drug transaction occurred. He saw Ryan hand appellant money and appellant hand him a brown bindle. The officer promptly detained Ryan, and found the brown bindle in his hand. (CT 7.) The bindle contained marijuana. (CT 7-8.) Appellant was a marijuana trafficker. Appellant was not arrested until an hour later; hence, the fact that he no longer possessed the money would not have reasonably been fatal to the prosecution. The arresting officer made a

positive identification of appellant as the seller. Given the strength of the prosecution case, it is unlikely that appellant would have exercised his right to jury trial. Had he done so, not only would he face the immigration consequences of a conviction, he faced the punishment of imprisonment.

Appellant has failed to establish any prejudice from the section 1016.5 nonadvisement. The Court of Appeal properly upheld the trial court's determination in denying appellant's motion to vacate his guilty plea.

B. Appellant Has Failed to Demonstrate the Likelihood of an Immigration-Neutral Disposition of His 1992 Offense

Appellant claims that—had he been properly advised—he would have obtained an immigration-neutral plea deal. However, he has failed to make the requisite showing. Appellant has provided no objective evidence concerning a prosecutorial willingness to offer him an immigration-neutral plea deal, the existence in 1992 of an immigration-neutral offense supported by the factual basis here that would conceal the true nature of his crime from the federal authorities, the likelihood of the court sustaining an immigration-neutral plea, any possible immigration-neutral outcome of a trial, or the likelihood that he would have opted for trial despite the overwhelming probability of conviction.

1. Appellant has failed to demonstrate that an immigration-neutral plea offer was available

Appellant's attempt to retroactively recalibrate the plea options available to him in 1992 must be rejected. His failure to demonstrate that an obviously immigration-neutral plea was available to him in 1992 illustrates the trouble with wading back into a 20-year-old plea negotiation.

Appellant is unable to demonstrate that an alternative immigration-neutral plea was, in fact, available to him. Appellant suggests that he could have sought to plead to sale of an unspecified controlled substance under Health and Safety Code section 11352, subdivision (a). (Opening Brief at

pp. 29-31.) Citing *Ruiz-Vidal v. Gonzales* (9th Cir. 2007) 473 F.3d 1072, 1078, he claims that section refers generally to sale of controlled substances, and without specificity as to the controlled substance involved, it could not be shown that the controlled substance for which he entered the plea was a controlled substance as defined in the federal Controlled Substances Act (CSA) and therefore would not have rendered him deportable.

To support his contention, appellant cites recent Ninth Circuit cases (*Tokatly v. Ashcroft* (9th Cir. 2004) 371 F.3d 613; *Ruiz-Vidal v. Gonzales*, *supra*, 473 F.3d 1072) that he believes suggest that Health and Safety Code section 11352 may not be a deportable offense. (Opening Brief at pp. 29-30.) This falls far short of the type of showing appellant would have to make to show prejudice and obtain relief.

As an initial matter, it is not clear that a conviction of violating Health and Safety Code section 11352 would not render appellant deportable were federal authorities to scrutinize the record underlying his plea. (*Ruiz-Vidal v. Gonzales*, *supra*, 473 F.3d at p. 1072.) Appellant assumes that "[a]n immigration-neutral alternative plea was reasonably available" to him because he could have simply pleaded to a different crime that did not name a controlled substance defined in the CSA. (Opening Brief at p. 28.) However, he neglects to recognize that federal immigration courts are permitted to look beyond the elements of appellant's plea and review the facts underlying the conviction.

> The methodology this circuit and others follow in order to determine whether a conviction constitutes a predicate offense for deportation purposes is well-established. When possible, we apply the "categorical" approach, "looking only to the statutory definition[ ] of the prior offense." [Citation.] However, when it is not clear from the statutory definition of the prior offense whether that offense constitutes a removable offense under section 237(a)(2)(E)(i), we apply a "modified" categorical

> approach under which we may look beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction, including "the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings." See *United States v. Rivera-Sanchez*, 247 F.3d 905, 908 (9th Cir. 2001) (en banc).

(*Tokatly v. Ashcroft*, *supra*, 371 F.3d at p. 620.)

In *Ruiz-Vidal*, the defendant pleaded to a nonspecified controlled substance offense. In determining whether this conviction rendered him deportable, the immigration judge ("IJ") questioned the government regarding which drug was involved in the underlying conviction and whether it was a controlled substance as defined in section 102 of the CSA. The IJ determined that the underlying substance was included within the ambit of section 102 of the CSA and ordered the defendant's removal. (473 F.3d at p. 1075.) The Ninth Circuit noted that it "may consider the charging documents in conjunction with the plea agreement, the transcript of a plea proceeding, or the judgment to determine whether the defendant pled guilty to the elements of the generic crime." (*Id.* at p. 1078.) The court had only the charging document and the abstract of judgment, neither of which it deemed sufficient in that case to identify the underlying substance. (*Id.* at p. 1079.)

The prosecutor here charged appellant with one count of transporting or selling marijuana in violation of Health and Safety Code section 11360, subdivision (a). (CT 23-24.) The information would have been available to federal immigration authorities reviewing whether appellant's alternative plea offense constituted a predicate offense for deportation purposes. Furthermore, information about the drug underlying the conviction would be available in appellant's plea proceedings, which appellant—at the time of his plea—had no reason to believe would not be permanently retained in the trial court record of conviction. In any event, if the trial court granted

appellant's section 1016.5 motion and allowed him to modify his plea to plead guilty to a violation of Health and Safety Code section 11352, *that* plea proceeding transcript would certainly be available to the federal immigration officials reviewing appellant's deportation proceedings. Whether appellant pleaded to Health and Safety Code section 11360 or Health and Safety Code section 11352, he could not have avoided a finding that his crime was marijuana trafficking and carried immigration consequences under a modified categorical approach.

Furthermore, appellant has failed to—and indeed lacks the ability to—demonstrate that he (or his counsel) would have known in 1992 that a California Health and Safety Code section 11352 conviction could potentially be a nondeportable offense, as he notes was suggested by the Ninth Circuit in 2004 and 2007.

2. Appellant has failed to demonstrate that the prosecutor would have made an immigration-neutral plea offer

Appellant has not "adduced any substantial evidence suggesting the prosecutor might ultimately have agreed to a plea that would have allowed [him] to avoid adverse immigration consequences." (*Resendiz*, *supra*, 25 Cal.4th at p. 254.) While *Resendiz* was decided in a habeas context, appellant bore a similar burden of affirmatively demonstrating grounds for relief when he brought his Penal Code section 1016.5, subdivision (b) motion in the superior court. As previously discussed, the prosecutor's consent to make an alternative, immigration-neutral plea offer may not be compelled or presumed.

Appellant implies that the prosecutor would have agreed to an alternative plea deal if it resulted in a higher sentencing triad, while evading federal policy regarding marijuana traffickers. (Opening Brief at p. 29.) However, this is an unwarranted assumption. This Court has cautioned

against forcing the prosecution to reinstate even a plea offer that had already been made by the prosecution, because that "would be inconsistent with the legitimate exercise of the prosecutorial discretion involved in the negotiation and withdrawal of offered plea bargains." (*Alvernaz*, *supra*, 2 Cal.4th at p. 943.)

Indeed, here, the trial court found that it was "highly improbable such a bargain [without negative immigration consequences] would have been offered." (CT 92.) The record of the preliminary hearing shows that an undercover officer was standing four feet from appellant when he observed Ryan hand appellant money, and appellant hand Ryan a brown bindle. (CT 7.) Ryan was immediately stopped, at which time police recovered the bindle, which contained marijuana. (CT 7-8.) Appellant did not have the money with him when arrested an hour after the exchange. (CT 9.) At the time of arrest, the arresting officer recognized appellant as the seller. (CT 16.) Given the strength of the evidence, the prosecutor would not have been under any pressure to permit appellant to plead to a different offense.

Nor is there any basis to believe that the prosecutor would have been willing to accept a plea for an offense without an adequate factual basis—there was no question that appellant's offense involved marijuana. Section 11352, subdivision (a) specifically *excludes* marijuana. It applies to any controlled substance specified in subdivision (b), (c) or (e) or paragraph (1) of subdivision (f), or *paragraph (14), (15), or (20) of subdivision (d)* of section 11054 of the Health and Safety Code. Marijuana is listed in paragraph *(13)* of subdivision *(d)*. It is not included in any of the other provisions specified in subdivision (a) of Health and Safety Code section 11352.

3. Appellant has failed to demonstrate that he would have accepted the alternative, immigration-neutral plea agreement

Appellant has not adduced independent, objective evidence—i.e., more than his self-serving statements in support of his motion—that he would have accepted an immigration-neutral alternative plea.

The analysis in *Alvernaz*, *supra*, is instructive. There, although the defendant stated in a declaration that in the absence of counsel's error he would have accepted the prosecution's offer, this Court found no independent corroboration of that claim. (2 Cal.4th at pp. 945-946.)

Alvernaz had been charged with one count of first degree robbery, two counts of second degree robbery, one count of first degree burglary, and one count of kidnapping for the purpose of robbery as well as personal use of firearm and prior conviction allegations. Based on his counsel's advice that his maximum exposure at trial would be eight years in prison, Alvernaz rejected an offer to plead guilty to one count of robbery with a four- or five-year maximum and opted for trial. He was convicted of all charges but the burglary charge, and the trial court imposed concurrent sentences, including life imprisonment with the possibility of parole. (*Alvernaz*, *supra*, 2 Cal.4th at pp. 929-930.) He subsequently represented that "had he known he faced prison confinement in excess of sixteen years, he would have accepted the plea offer." (*Id.* at p. 931.)

Finding that Alvernaz's statement was "insufficiently corroborated by independent, objective evidence," this Court found, instead, that "[t]he declarations of petitioner and his trial counsel . . . and the reasonable inferences drawn therefrom, establish that petitioner's decision to reject the plea offer was motivated primarily by a persistent, strong, and informed hope for exoneration at trial, and that any evaluation of precise sentencing

options was secondary in his thinking." (*Alvernaz*, *supra*, 2 Cal.4th at p. 945.)

In this context, appellant's self-serving statement that with section 1016.5 advisement he would have accepted a proffered immigration-neutral plea bargain, "is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims." (*Alvernaz*, *supra*, 2 Cal.4th at p. 938.)

A determination of the "reasonable probability" a defendant would have accepted or rejected the plea requires a look at "the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, *as viewed at the time of the offer*." (*Alvernaz*, *supra*, 2 Cal.4th at p. 938, italics added.)

> A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action. More particularly, absent misrepresentation or other impermissible conduct by state agents, a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise. A plea of guilty triggered by the expectations of a competently counseled defendant that the State will have a strong case against him is not subject to later attack because the defendant's lawyer correctly advised him with respect to the then existing law as to possible penalties but later pronouncements of the courts, as in this case, hold that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered.

(*Brady v. United States* (1970) 397 U.S. 742, 757.)

To the contrary, appellant never suggested below that he would have been willing to plead to a greater offense. (See CT 77-78 [appellant's reply to People's opposition to motion to vacate plea, stating the "lesser" charges to which he could have plead but containing no assertion that he would

have been willing to plea to a greater charge].) While appellant stated in his declaration he would have sought a plea bargain without the negative immigration consequences, he never asserted that would include pleading to a crime with a potentially greater penal consequence. Appellant's resort to this new "pleading up" theory for the first time on appeal, moreover, shows the perils of engaging in ever evolving speculation about what could have happened.

In any event, it is highly improbable that appellant would have been willing to plead to a crime with a greater potential penalty. Although imposition of sentence was suspended and appellant was granted probation, if he violated probation he would have faced a greater potential prison term had he pleaded guilty to a violation of Health and Safety Code section 11352. That offense would have exposed him to a prison term of 3, 4, or 5 years, while Health and Safety Code section 11360 exposed him to a prison term of 2, 3, or 4 years. Appellant assumes that the court would have granted probation, but it could have required appellant to serve a prison term.

4. Appellant has failed to demonstrate that the court would have approved the immigration-neutral plea agreement

A plea agreement between the prosecutor and defendant does not bind the court to accept it. Appellant has failed to demonstrate that the court would have accepted the alternative, immigration-neutral plea deal.

An agreement between the parties does not "bind a trial court which is required to weigh the presentence report and exercise its customary sentencing discretion." (*People v. Kaanehe* (1977) 19 Cal.3d 1, 14.) "Although the analogy may not hold in all respects, plea bargains are essentially contracts." (*Puckett v. United States* (2009) 556 U.S. 129, 137; see also *People v. Segura*, *supra*, 44 Cal.4th at p. 930 ["Because a

'negotiated plea agreement is a form of contract,' it is interpreted according to general contract principles"].)

> In addition to proving that he or she would have accepted the plea bargain, a defendant also must establish the probability that it would have been approved by the trial court. Such a requirement is indispensable to a showing of prejudice because "'[j]udicial approval is an essential condition precedent to any plea bargain'" negotiated by the prosecution and the defense [citation], and a plea bargain is ineffective unless and until it is approved by the court. [Citations.]

(*Alvernaz*, *supra*, 2 Cal.4th at pp. 940-941.)

This Court rejected Alvernaz's invitation to "promulgate a 'presumption' that a plea bargain offered by a prosecutor would have been approved when submitted by the parties to the trial court" (2 Cal.4th at p. 941), noting that "specific enforcement of a failed plea bargain" is disfavored in California because courts are allowed to exercise their sentencing discretion and should be able to take into account changed circumstances, among other factors (*id.* at p. 942).

A trial court possesses discretion in determining whether a sufficient factual basis exists for a guilty plea. (*People v. Marlin* (2004) 124 Cal.App.4th 559.) A court retains the discretion not to sentence in accordance with the terms of the plea, especially if it learns of facts or law that render the agreed sentence inappropriate. (*People v. Akins* (2005) 128 Cal.App.4th 1376.) Even if the defendant has detrimentally relied on a plea bargain such that the prosecutor would be bound by the agreement, the trial court still has the option to disapprove of the agreement. (*People v. McClaurin* (2006) 137 Cal.App.4th 241.)

Appellant has not shown that the trial court would have accepted an alternative-neutral plea deal.

5. Appellant has failed to demonstrate that he would have opted for trial despite the overwhelming probability of conviction

Appellant's self-serving claim that "his risk calculation about going to trial would have been altered" had he received the section 1016.5 advisement (Opening Brief at 32) must be rejected. His likelihood of conviction was overwhelming. Appellant has failed to adduce objective evidence that he would have chosen his chances at trial.

It was not reasonably probable that if properly advised, appellant would have opted for trial. As discussed above, losing at trial would have subjected appellant to the same immigration consequences as entering the plea *in addition* to receiving a higher sentence. (See *Resendiz*, *supra*, 25 Cal.4th at p. 254.) It would have been unreasonable for appellant to choose a trial that would have most likely resulted in his conviction. As noted above, to the extent appellant could have hoped to be acquitted in spite of his guilt, this position lacks support. (*Strickland*, *supra*, 466 U.S. at pp. 694-695 ["An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, 'nullification,' and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency"].)

CONCLUSION

Accordingly, respondent respectfully requests that the Court of Appeal's decision be affirmed.

Dated: August 15, 2012

Respectfully submitted,

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Chief Assistant Attorney General
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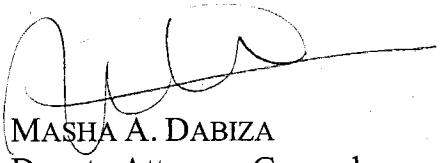
Senior Assistant Attorney General
STAN HELFMAN
Supervising Deputy Attorney General
SETH K. SCHALIT
Supervising Deputy Attorney General



MASHA A. DABIZA
Deputy Attorney General
Attorneys for Plaintiff and Respondent

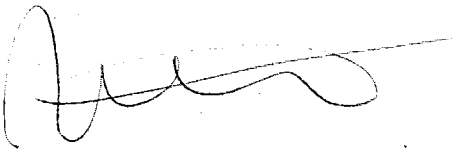
SF2012203989

CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 11,603 words.

Dated: August 15, 2012

KAMALA D. HARRIS
Attorney General of California



MASHA A. DABIZA
Deputy Attorney General
Attorneys for Plaintiff and Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Rodrigo Martinez Martinez***
No.: **S199495**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On August 15, 2012, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Sara E. Coppin
Attorney at Law
11075 Treehenge Lane
Auburn, CA 95602
(2 copies)

The Honorable Jeffrey F. Rosen
District Attorney
Santa Clara County District Attorney's Office
70 W. Hedding Street
San Jose, CA 95110

Attn: Executive Director
Sixth District Appellate Program
100 North Winchester Blvd., Suite 310
Santa Clara, CA 95050

Sixth Appellate District
Court of Appeal of the State of California
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

County of Santa Clara
Criminal Division - Hall of Justice
Superior Court of California
Attention: Criminal Clerk's Office
191 North First Street
San Jose, CA 95113-1090

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on August 15, 2012, at San Francisco, California.

Tan Nguyen
Declarant

Signature

SF2012203989
20630936.doc