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 REPLY 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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions and Statutes

A. Respondent's Arguments Attack A Claim Petitioner Has Not Tendered And Have Little, If Anything, To Do With The Claim Actually Before This Court

The bulk of Respondent's "Answer Brief on the Merits" is devoted to attacking a claim that Petitioner has never made – namely that the *trial court* violated his right to Due Process by failing to advise him of the fact that his guilty plea and resulting conviction would result in specific, disastrous immigration consequences. (*See*, Answer at 11-22). Recharacterizing Petitioner's argument in this way is certainly convenient; as Respondent correctly points out, there is no authority for the proposition that the trial court must include such information in the advisements it is required to give in order to satisfy its Due Process obligations under the relevant authorities, *Boykin v. Alabama* (1969) 395 U.S. 238, *In re Tahl* (1969) 1 Cal.3d 122, and their progeny. *See, e.g., United States v. Delgado-Ramos* (9th Cir. 2011) 635 F.3d 1237, 1240-41 (discussed in Answer at 15, *et seq.*). But in the course of reframing Petitioner's claim for him, Respondent also attempts to rewrite the body of law that *does* apply here – namely Penal Code § 1018[1] and the cases interpreting that statute over the last several decades, notably *People v. Superior Court (Giron)* (1974) 11 Cal.3d 792.

The crux of Petitioner's claim has remained consistent from the time he argued his "motion to withdraw plea" in the Superior Court, through briefing in the Court of Appeal, his Petition for Review, and his Opening Brief on the Merits in this Court. It was summarized most recently (in the latter brief) as follows: "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

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

withdraw that plea pursuant to section 1018." (Opening Brief at 11).[2] On every occasion, he has relied on the statutory imperative that the provision for leave to withdraw a guilty plea "shall be liberally construed . . . to promote justice" (section 1018), and the oft-repeated principle that "a plea of guilty may be withdrawn for 'mistake, ignorance or any other factor overreaching defendant's free and clear judgment.'" *Giron*, 11 Cal.3d at 797 [citations omitted]; *accord, e.g., People v. Johnson* (2009) 47 Cal. 4th 668, 679.

The heart of the argument has been, and continues to be, that Petitioner's ignorance of the fact that his plea means he will be forever banished from this country – and lose his profession to boot – was a factor of such enormous import that it "overreached" his "free and clear judgment." In support of that argument, Petitioner has relied, and does rely, on the teaching of *Padilla v. Kentucky* (2010) 559 U.S. 356, that knowing that terrible deportation consequences are a "virtually certain" consequence of his plea (as opposed to being merely an abstract, amorphous risk) can be a matter of decisive importance to a noncitizen defendant in deciding whether to accept a plea bargain. *Id.* at 364, 367-68; *see also, People v. Martinez* (2013) 57 Cal.4th 555, 563-64 [reiterating, *inter alia*, that "a defendant 'may view immigration consequences as the only ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges'"]. And – as has been briefed extensively

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[2]*Compare*, CT 4 ["Motion to Withdraw," framing the argument as follows:"The court is urged to permit Mr. Patterson to withdraw his guilty plea to Count VI for good cause shown, in that he was at the time the pleas were entered unaware of the mandatory deportation disaster they triggered, or the loss of his license to practice as a registered nurse, and he would not have entered this disposition if he had know the truth."].

– *Padilla* has particular significance because it established that Petitioner's trial counsel had a duty to advise him that the guilty plea she urged him to take "made him subject to automatic deportation."[3] *Padilla*, 559 U.S. at 360; see also, *id.* at 367-68.

In its effort to convert Petitioner's claim into something that it can defeat, Respondent points to a sentence in the "Notice of Motion and Motion to Withdraw Plea," asserting that, because Petitioner was unaware of the immigration and professional disasters it would cause, his "plea was therefore not entered knowingly, intelligently, or voluntarily in violation of the Fifth and Fourteenth Amendments to the U.S. Constitution, and parallel provisions of the California Constitution." (CT 25-26). But Petitioner did not say or imply, there or anywhere else, that the violation was the result of any failure on the part of the trial court to give required advisements.[4] Quite to the contrary: he consistently made clear that the failure was on the part of his trial counsel. (*See*, CT 32-34; RT 5-10).

Notwithstanding the (perhaps gratuitous) references to the Due Process Clause in the

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[3]Although Respondent offered vigorous arguments concerning *Padilla* in the lower courts – mostly (and inaccurately) to the effect that the *Padilla* holding was limited to condemning "affirmative misadvice" by trial counsel – Respondent now insists that *Padilla* is "irrelevant" to the pending appeal and thus declines otherwise to discuss its significance. Petitioner will discuss presently why Respondent's effort to avoid *Padilla* is untenable; for now he will only suggest the obvious: that it consists of an implied concession that Respondent has no viable response to the weight of the Supreme Court's teaching.

[4]So far as undersigned counsel can discern, the attorney who drafted and presented Petitioner's section 1018 motion was referring to a different Due Process claim that has appeared in some caselaw, namely that *trial counsel's* failure to provide adequate advice rendered Petitioner's plea "unintelligent." *See*, *State v. Kostyuchenko* (Ohio Ct. App. 2014) 8 N.E. 353, 355.

motion filed on his behalf, Petitioner has never argued that the trial court needed to find a Due Process violation in order to grant him relief.[5] Nor – despite his explicit reliance on *Padilla v. Kentucky* – did he argue that the trial court needed to find a Sixth Amendment violation of the right to the effective assistance of counsel. That is because the relief he was seeking – withdrawal of his guilty plea pursuant to section 1018 – did not require him to establish any specific constitutional violation, state or federal. Rather, it only required him to establish that, due to mistake, ignorance, or some other factor, his guilty plea was not the result of his own clear, informed judgment. *Giron*, 11 Cal.3d at 797.

Thus Petitioner's argument to the trial court put it quite plainly that Petitioner was "raising a *Giron* claim that at the time of plea, he was unaware of the mandatory detention and mandatory deportation consequences of the plea." (CT 30-31). And as this Court stated explicitly in *Giron*, such a claim does *not* depend on a showing that the trial court failed to provide advisements required under the Due Process Clause. *Giron*, 11 Cal.3d at 797.

In *Giron* – just as in this case – defendant's claim was premised quite simply on the fact that he was unaware of the immigration catastrophe his plea would set in motion:

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[5]Indeed, the concept never arose at the hearing in Superior Court; no Due Process claim was asserted on appeal; and neither Respondent's Brief on appeal nor the Court of Appeal's opinion make any mention whatever of Due Process, the Fourteenth Amendment or any correlative state protections. *See*, Pet. Exh. A at 10-15 [Court of Appeal opinion discussing Motion to Withdraw Plea]. The only reference to Due Process was in Appellant's Reply Brief, where it was discussed in response to Respondent's lead argument on appeal, to the effect that Petitioner had waived his right to seek appellate relief. Respondent has since abandoned that argument (and much else that it argued below), substituting instead its new effort to reshape Petitioner's claim into a straw man that it can pummel.

Giron's motion was presented to the court on the ground that at the time he entered a plea of guilty he, his attorney, the prosecutor and the court were all unaware that deportation would be a collateral consequence of his plea, and that had he been aware of that consequence he would not have bargained for his freedom on probation in exchange for his concession of guilt. *We do not deem the thrust of the argument to be that Giron was entitled as a matter of right to be advised of such collateral consequences* prior to the acceptance of his plea nor do we so hold.

A trial court, nevertheless, in the exercise of its discretion directed to the promotion of justice may take into consideration such material matters with which an accused was confronted and as to which he made erroneous assumptions when he entered a guilty plea. The court might consider that justice would not be promoted if an accused, willing to accept a misdemeanor 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. As a general rule, a plea of guilty may be withdrawn "for mistake, ignorance or inadvertence or any other factor overreaching defendant's free and clear judgment."

Ibid. (emphasis supplied; citations omitted).

The Court's references to "collateral consequences" are a key to revealing the fatal defect in Respondent's line of argument. Respondent's argument assumes that, in order to show that his "free and clear judgment" was "overreached" (as those terms are used in regard to section 1018), Petitioner must show that his plea was not "knowing and voluntary" – as that phrase is used in the *Boykin/Tahl* line of Due Process cases that define the trial court's duty to advise defendants of the consequences of their guilty pleas. But Respondent's

predicate assumption rests on nothing more than a play on words. In order to render the defendant's plea "knowing and voluntary" for purposes of that Due Process principle, the trial court need only advise him of the "*direct* consequences" that flow from the plea – basically the penalties he will suffer under criminal law. *Brady v. United States* (1970) 397 U.S. 742, 757; *see also, Delgado-Ramos,* 635 F.3d at 1239. Thus even though the defendant does not *know* of the terrible immigration consequences that will flow from the plea, his plea is still considered "knowing and voluntary" in the specific *Boykin/Tahl* context because those consequences are considered "collateral," rather than "direct."[6] *Ibid.*

What *Giron* makes clear is that this distinction between "direct" and "collateral" consequences – and thus the definition of "knowing and voluntary" employed in the Due Process line of cases on which Respondent relies – has no play in the consideration of a motion to withdraw a guilty plea under section 1018. Instead, the inquiry comes down to whether, in real world terms, there was something that the defendant did not know about the consequences of his plea that – had he known – would have changed his mind about entering that plea.[7] In this case, the uncontroverted evidence is that Petitioner did not know that his

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[6]As the Ninth Circuit explained in the case cited by Respondent: "'what renders the plea's immigration effects "collateral" is not that they arise "virtually by operation of law," but the fact that deportation is "not the sentence of the court which accepts the plea but of another agency over which the trial judge has no control and for which he has no responsibility."'" *Delgado-Ramos,* 635 F.3d at 1239 [citations and internal alterations omitted].

[7]Respondent notes, accusingly, that Petitioner "has never challenged the *Resendiz's* and *Zamudio's* [*sic*] rule that immigration consequences are collateral to the conviction and he has not challenged or discussed those cases in this appeal." (Answer at 19, citing, *In re Resendiz* (2001) 25 Cal.4th 230, and *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183). Although Petitioner did in fact cite *Resendiz* in his Opening Brief (in another context)

guilty plea "made him subject to automatic deportation" (*Padilla*, 559 U.S. at 360) and permanent banishment from the United States as well as the loss of his hard-earned license to practice his profession. Although Respondent attempts to argue otherwise, it cannot fairly be asserted that Petitioner would have accepted the tendered plea bargain and entered the plea had he known of this catastrophe.[8]

Respondent attempts to distinguish *Giron* on the ground that, unlike the defendant in that case, Petitioner received the standard advisement, *per* section 1016.5, that any conviction he suffered "may have" adverse immigration consequences. Respondent relies in this regard on cautionary *dicta* in *Giron*, in which the Court notes the defendant's situation was different from one in which an "accused enters a guilty plea hoping for leniency which is not forthcoming [because] Giron was not gambling on the severity of possible penalties for all parties were unaware that dire consequences, in addition to any punishment the court might impose, could result from a plea of guilty." *Giron*, 11 Cal.3d at 797-98.

The analogy does not hold. Petitioner was not in the position of the hypothetical "accused" described in *Giron*, who knows what he is getting himself into but clings to some unsubstantiated hope of leniency. That person knows the nature of the consequences that he

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it is true that he did not "challenge" the "rule that immigration consequences are collateral" – because that rule has absolutely nothing to do with the case at bench. Moreover, Respondent's accusatorial tone is a little odd, given that its Answer Brief was the very first time in the entire history of this litigation that Respondent made any mention whatever of "direct" or "collateral consequences," or Due Process, or anything else pertinent to what is now its central argument. Petitioner had no reason to "challenge" cases supporting an argument that was never made.

[8]Respondent's arguments regarding "prejudice" will be addressed in the text, *post*.

surely *will* face, and "gambles" that they will be less severe than they might be. Petitioner, on the other hand knew only that, as an abstract matter, some immigration consequences *might* follow. Given that – unbeknownst to Petitioner – the most drastic immigration consequences were in fact "virtually certain" to follow, the only gambling metaphor that works is one that involves a country boy who stumbles into a game with a card sharp playing with a stacked deck. While Petitioner was a little better informed than Mr. Giron (who did not receive the standard advisement, as his conviction predated passage of section 1016.5), he remained in the same essential position as that defendant – "unaware that deportation *would be* a collateral consequence of his plea ...." *Giron*, 11 Cal.3d at 797. To put it in terms of Respondent's gambling metaphor: While Petitioner, unlike Mr. Giron, had been told there was a possibility he might lose, neither of them was informed of the actual truth, namely that losing was a dead certainty.

It is in this regard that the *Padilla* analysis is particularly instructive, as are the later cases that have applied it. *Padilla* and its progeny teach that there is a world of difference for a defendant between hearing of some abstract possibility of immigration consequences and knowing that federal arrest, deportation and permanent banishment are a "practically inevitable" result of his plea. *Padilla*, 559 U.S. at 363-64; 368-69; see also, *INS v. St. Cyr* (2001) 533 U.S. 289, 325 ["There is a clear difference . . . between facing possible deportation and facing certain deportation"]. The point was made most plainly by a federal judge in Florida who rejected the same government argument about the adequacy of a generalized warning and granted the defendant leave to withdraw his plea:

"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 (9th Cir. 2015) 797 F.3d 781, 790 [emphasis supplied]; quoting, *United States v. Choi*, Case No. 4:08-CV-00386-RH, Tr., Docket No. 96, at 52 (N.D. Fla. Sept. 30, 2008); see also, *e.g.*, *Commonwealth v. DeJesus* (Mass. Sup. Jud. Ct. 2014) 9 N.E.2d 789, 795-96; *State v. Nunez-Valdez* (N.J. 2009) 975 A.2d 418, 426.

Respondent dismisses this entire line of cases with the explanation that *Padilla* concerned the right to the effective assistance of counsel under the Sixth Amendment and Petitioner eschewed such a constitutional claim as a basis for his section 1018 motion; thus (Respondent contends) neither *Padilla* nor its progeny are relevant here. But, as discussed, section 1018 does not require a claim that the Petitioner's constitutional rights were violated; rather, the statutory procedure is focused instead on the question of whether it is fair to hold Petitioner to his plea given that he was unaware of its calamitous consequences. And the fact that, according to the United States Supreme Court, his lawyer had been under a duty to make him aware of those consequences is certainly pertinent to answering the question.

The point is readily illustrated by several cases discussed by Respondent. (*See*, Answer at 28-29, discussing, *People v. Ramirez* (2006) 141 Cal. App. 4th 1501; *People v. Dena* (1972) 25 Cal. App. 3d 1001; and *People v. McGarvy* (1943) 61 Cal.App. 2d 557). As Respondent accurately (if ungrammatically) notes, in each of those cases relief under section 1018 was held to be appropriate because "the fundamental rights of the defendants were neglected or were the result of extrinsic causes [*sic*]." (Answer at 28). Specifically,

the defendant in *McGarvy* had no legal representation whatever, while in both *Dena* and *Ramirez* the prosecution had withheld crucial evidence that likely would have affected the defendant's decision regarding entering a plea.

But not one of those cases was premised on an explicit claim that the defendant's constitutional rights were violated. The opinion in *Dena* never even mentions the prosecution's constitutional duty to disclose pertinent evidence guaranteed by *Brady v. Maryland* (1963) 373 U.S. 83, while the *Ramirez* court drops a footnote noting that the defendant had raised an (alternative) *Brady* claim but concludes: "Because we reverse on statutory grounds [*i.e.*, section 1018], we need not address the claimed *Brady* violation." *Ramirez*, 141 Cal.App.4th at 1503 n.1. And *McGarvy* does not suggest that taking the plea of an unrepresented defendant violated the constitutional right to appointed counsel – nor could it, for that right was not recognized as such until the Supreme Court's decision in *Gideon v. Wainwright* (1963) 372 U.S. 335, two decades later.

As those cases demonstrate, the fact that (as Respondent puts it) "the fundamental rights of the defendant[] were neglected" is extremely pertinent to the determination of his section 1018 motion to withdraw his plea – regardless of whether he specifically predicates his motion on the violation of the Constitution or just depends on the facts that demonstrate both a constitutional violation and ordinary unfairness. *See, United States v. Bonilla* (9th Cir. 2011) 637 F.3d 980 [applying *Padilla* analysis in finding defendant met "fair and just reason" standard for withdrawing plea under F.R.Crim.P. 11(b), without explicit holding of Sixth Amendment violation]. In short, the fact that "constitutionally competent counsel would have

advised [Petitioner] that his conviction ... made him subject to automatic deportation" (*Padilla*, 559 U.S. at 360) has everything to do with this case – regardless of whether Petitioner invoked the Sixth Amendment in arguing the motion to withdraw his plea pursuant to section 1018.

B. Respondent Has Relinquished the Bulk of the Arguments It Presented Below

Respondent has all but abandoned the arguments it presented in the lower courts in favor of the new approach just discussed.[9] That interesting choice raises the obvious inference that Respondent lacks confidence in those earlier arguments, as well as the

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[9]Respondent main argument, just discussed, is brand-new: there was no hint of it in anything asserted in the courts below. This adds some irony to Respondent's decision to spend the first pages of its Answer Brief complaining that the words with which Petitioner framed the issues in his Opening Brief were not exactly the same as those used in the Petition for Review. (Answer at 1-3). It is unclear, however, what Respondent is complaining about, or what remedy it seeks for this imagined transgression. Respondent essentially concedes that the *substance* of the issues as framed did not change, but that Petitioner merely "collapsed" the first and second issues from the Petition for Review, and "renumbered issue (3) as (2)." (Answer at 2). Petitioner is at a loss as to how this effort at simplifying and clarifying the issues is unfair to Respondent or an imposition on the Court.

Respondent also attempts a bit of "gotcha" – suggesting that, because Petitioner did not specifically mention the loss of his nursing license in the issues as stated, but instead emphasized the "disastrous immigration consequences" that resulted from his plea, he is now somehow estopped from mentioning the destruction of his livelihood. (Answer at 2, 20). As Respondent concedes, however, Petitioner "raised the collateral effect on his professional license in his motion to withdraw his plea in the trial court and in his direct appeal" (*id.* at 2-3), and it was fully discussed in the Opening Brief. Obviously, Respondent has not been unfairly surprised on this point; nor is there any rational argument that it was somehow "waived." As a matter of record fact, the immigration disaster and the professional disaster are inextricably intertwined: Petitioner is legally present in this country on a work visa; if he loses his nursing license he will be deported regardless. Similarly, if he is deported while Nursing Board proceedings are pending, he will be effectively unable to defend himself there. Thus the issues as framed contemplate the entire, unitary catastrophe; it is all properly before the Court.

decisions of the courts below to the (great) extent that they adopted Respondent's positions.

Notably, Respondent makes no effort here to support the central assertion of both the trial court and the Court of Appeal to the effect that *Padilla v. Kentucky* has nothing to do with the instant case because *Padilla* was simply a "misadvisement" case. (*See*, RT 9 ["I don't think *Padilla* is relevant. That has to do with misadvisement. This is not misadvisement."]; Pet. Exh. A (Court of Appeal's opinion) at 13 ["[I]n *Padilla*, defense counsel gave incorrect advice to her noncitizen client . . . . There was no misadvisement in this case"; see also, *id.* at 5-8]. In fact, in briefing the accompanying *habeas corpus* case, the Attorney General concedes that the *Padilla* "court did *not* limit the attorney's duty to refrain[ing] from misadvice." (Return at 19-20 [emphasis supplied]). Nor does Respondent attempt to defend the Court of Appeal's (frankly bizarre) misreading of the Ninth Circuit's important opinion in *United States v. Bonilla*, 637 F.3d 30.[10] And perhaps most striking is Respondent's complete abandonment of what was its principal argument before the Court of Appeal – the contention that Petitioner had "waived" his right to lodge any appeal at all.

The Attorney General is to be commended for choosing not to burden this Court with those failed assertions. In any event, how she chooses to frame Respondent's answering brief is her decision. But one omission in particular is difficult to understand: In the time period between Petitioner's filing of the Opening Brief on the Merits and Respondent's Answer Brief, the State of California enacted a brace of new laws, codified as Penal Code sections 1016.2 and 1016.3, that speak directly and obviously to the issues presented in this

[10]The Court of Appeal's misconceived interpretation of *Bonilla* is fully described in the Opening Brief at page 25, note 13.

case. Although Respondent has chosen to ignore those statutes, Petitioner believes they must be addressed and now turns to that task.

C. The Legislature Has Made It Clear That Defendants In Petitioner's Situation Should Be Granted Relief

If there is any remaining doubt that Petitioner is entitled to withdraw the guilty plea he entered while unaware of its actual, terrible immigration consequences, the recent legislation, enacted the month after the Opening Brief was submitted (but nearly two months before the Answer Brief was filed) should put that doubt to rest. Penal Code section 1016.2, signed by the Governor on October 9, 2015, provides, in pertinent part, as follows:

> (a) In *Padilla v. Kentucky*, 559 U.S. 356 (2010), the United States Supreme Court held that the Sixth Amendment requires defense counsel to provide affirmative and competent advice to noncitizen defendants regarding the potential immigration consequences of their criminal cases. California courts also have held that defense counsel must investigate and advise regarding the immigration consequences of the available dispositions, and should, when consistent with the goals of and informed consent of the defendant, and as consistent with professional standards, defend against adverse immigration consequences (*People v. Soriano*, 194 Cal.App.3d 1470 (1987), *People v. Barocio*, 216 Cal.App.3d 99 (1989), *People v. Bautista*, 115 Cal.App.4th 229 (2004)). . . . .
>
> (h) It is the intent of the Legislature to codify *Padilla v. Kentucky* and related California case law and to encourage the growth of such case law in furtherance of justice and the findings and declarations of this section.

Pen. Code, § 1016.2. An accompanying statute, enacted at the same time, provides in pertinent part:

(a) Defense counsel shall provide accurate and affirmative advice about the immigration consequences of a proposed disposition, and when consistent with the goals of and with the informed consent of the defendant, and consistent with professional standards, defend against those consequences.

Pen. Code, § 1016.3.

What these statutes plainly import is that, before a noncitizen defendant enters a guilty plea, he is entitled to have his lawyer affirmatively advise him of the actual immigration consequences of that plea – at least insofar as those consequences are "succinct and straightforward." *Padilla*, 559 U.S. at 369. The phrase "affirmative and competent advice," and the citations to *Padilla*, *Soriano*, *Barocio* and *Bautista*, taken together, clarify that it is not enough for counsel to do what Petitioner's lawyer says that she did – namely, read the defendant the general advisement set forth in section 1016.5 to the effect that a conviction "may have" various adverse immigration consequences. *See*, *Padilla*, 559 U.S. at 368-69; *Soriano*, 194 Cal.App.3d at 1482 ["Even assuming counsel's version of events is the correct one, her response to defendant's immigration questions was insufficient. By her own admission she merely warned defendant that his plea might have immigration consequences. Had she researched the matter she would have known that his guilty plea . . . made him deportable."]; *Barocio*, 216 Cal.App.3d at 107 [counsel is required not only to "research the specific immigration consequences of the alien defendant's guilty plea," but also to "attempt to negotiate a plea which takes the defendant out of the deportable class of convicts"].

The Legislature also made clear that it expects the courts to make every effort to enforce the right of noncitizens to receive this "affirmative and competent advice" from their

lawyers. As the Legislature did not create some new and distinct remedy for noncitizen defendants to employ, it follows that enforcement must be through existing procedural vehicles – of which section 1018 is certainly among the most significant. In short, the new statute mandates that noncitizen defendants who, like Petitioner, have entered a guilty plea without being advised by their lawyers that a "succinct and straightforward" federal immigration statute will require their automatic deportation, must be allowed to withdraw those disastrous pleas.

The question of whether these newly enacted statutes apply to Petitioner's case is readily answered by this Court's precedent, which has long provided that "absent a saving clause, a criminal defendant is entitled to the benefit of a change in the law during the pendency of his appeal." *People v. Babylon* (1985) 39 Cal. 3d 719, 722; *citing*, *People v. Rossi* (1976) 18 Cal.3d 295; *In re Estrada* (1965) 63 Cal.2d 740; *quoted with approval in, People v. Wright* (2006) 40 Cal. 4th 81, 95. In this instance, the Legislature did not include or imply a "savings clause," reserving application of the new statutes to criminal convictions arising after their enactment. On the contrary, the language of the statutes makes clear the urgency with which Legislature intended that the right they described should be enforced. *Cf.*, *People v. Rossi*, 18 Cal. 3d at 305-306 [determining whether to apply new law to existing cases, Court is "required to ascertain the legislative intent."].

Thus, while the principles set forth in existing precedent were already sufficient to require that the judgment be reversed, the enactment of sections 1016.2 and 1016.3 makes it manifest that Petitioner should be permitted to withdraw his guilty plea.

D. Respondent's Other Arguments Are Meritless

1. The Phantom "Credibility Determination"

Aside from its newly-minted effort to defeat Petitioner's nonexistent Due Process claim, the assertion that Respondent's presses most strenuously is that "the trial court found that appellant was credible when he entered his plea and not credible when he later said he would have rejected it" (Answer at 27, citing RT 8, 10), and "[t]his court should accept the trial court's finding of credibility." (*Id.* at 29; see also, *id.* at 22, 23, 27, 32). Like Respondent's other main argument, this contention depends on something nonexistent – in this instance, on a "credibility finding" that, so far as we can discern, was never made.

Undersigned counsel has read through the (extremely brief) Reporter's Transcript many times. Certainly there is no explicit reference to a "credibility finding" anywhere within it – the word "credibility" is never used. Nor is there any implied finding by the trial court that Petitioner was lying when he stated, under oath, that he would have rejected the plea agreement had he been properly advised that it would result in his automatic, mandatory deportation and permanent exile.

The closest thing to an implied credibility finding is in the trial judge's emphasis on Petitioner's acknowledgment that he received and understood the section 1016.5 advisement about immigration consequences that "may have" resulted from his conviction. But for reasons that now have been reiterated several times, that advisement was no substitute for the advice Petitioner should have gotten – that deportation would be a "virtual certainty."

Nothing in what Petitioner said on the record could fairly be taken as admitting that

he would have taken the plea bargain if he had known the truth that (in the trial court's words) "the federal consequences are disastrous." (RT 10:18). And nothing in what the trial court said indicates that it based its ruling on a "credibility finding" in that regard.

Rather, the trial court plainly based its denial of Petitioner's motion on a misreading of the law; it believed and said that Petitioner was entitled to nothing more than the 1016.5 advisement and that *Padilla* – which clearly holds to the contrary – was only concerned with "misadvisement" and thus was not "relevant."[11] As pointed out in the Opening Brief – and not disputed by Respondent – when the trial court proceeds on the basis of a mistaken understanding of the law, it abuses its discretion perforce. *In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 311; *People v. Superior Court (Humberto S.)* (2008) 43 Cal.4th 737, 746; *In re Marriage of LaMusga* (2004) 32 Cal. 4th 1072, 1105; *Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436.

2. It Was Not Petitioner's Fault That His Lawyer Did Not Do Her Job

Respondent asserts that it was Petitioner's own fault that he did not know that the tendered plea bargain would mean deportation, banishment and the loss of his nursing license: his "lack of information here was due to his own failure to talk with his immigration attorney, knowing that his criminal defense counsel was not proficient in that field." (Answer at 29, citing CT 38). But what the cited portion of the record reveals is that he learned of both his lawyer's lack of "proficiency" and the plea bargain itself at the last

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[11]"The fact that 1016.5 uses the word [*sic*] 'may have consequences' is totally sufficient. And I don't think *Padilla* is relevant. That had to do with misadvisement. This is not misadvisement." (RT 9:3-6).

minute – when the latter was presented to him in court, on a "take-it-right-now-or-lose-it" basis. He simply did not have the chance then to consult an immigration attorney (though he tried). (CT 38).

Even more to the point: He *had* an attorney, who was in court with him then, and who was under a duty to ascertain the "succinct and straightforward" immigration consequences of his plea. *Padilla*, 559 U.S. at 368-69. All that counsel would have needed to do to be aware of those dreadful consequences was to have read *Padilla* itself – something that every competent criminal defense lawyer advising a noncitizen regarding the entry of a guilty plea was and is presumed to have done. *See*, *Hinton v. Alabama* (2014) ___ U.S. ___, 134 S. Ct. 1081, 1089 ["An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland* [*v. Washington* (1984) 466 U.S. 668]."

3. There Is Ample Corroboration That Petitioner Would Have Rejected the Plea Deal

Respondent contends that Petitioner's "self-serving" declaration regarding what his lawyer did and did not tell him was insufficient to support his motion because it was not "corroborated by independent, objective evidence." (Answer at 29, citing *People v. Martinez*, 57 Cal.4th at 565; and *In re Alvernaz* (1992) 2 Cal.4th 924, 938). As set forth at some length in Petitioner's Traverse (at pp. 21-25), there was and is ample corroborating evidence. A particularly persuasive bit of corroboration was discussed in precisely that regard at the hearing in the trial court: A letter that defense counsel had written to the District Attorney the day before the hearing offered to have Petitioner plead to *two* felony drug

charges – which would have had the same calamitous professional and immigration consequences – while touting Petitioner's determination to stay in the United States, his work as a nurse in the local hospital and his role in the local community as reasons why he should be treated leniently. (CT 44-46). As Petitioner's (successor) counsel argued at the section 1018 hearing, the letter "shows an ignorance of the law, an ignorance of the potential consequences." (RT 7). It is unthinkable that defense counsel could have sent that letter and then, the following day, have known *and told Petitioner* that the plea bargain she urged him to take would inevitably strip him of both his profession and his ability to remain in the United States. And it is unimaginable that, if Petitioner had known what was coming, he would have gone on to spend years and a small fortune attempting to undo that bargain. *See*, *DeBartolo v. United States* (7th Cir. 2015) 790 F.3d 775, 778 (per Posner, J.) ["[Petitioner] "unquestionably wants to roll the dice, which 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."]

4. There Is Ample Evidence of "Prejudice" – Assuming Any Is Required

Finally, Respondent argues that Petitioner has failed to show "prejudice." No explicit "prejudice" requirement appears in the language of section 1018, nor in the many cases or treatises interpreting it. Rather the rule has simply and consistently been summarized as follows: "[T]he least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient cause to permit a change of plea from guilty to not guilty." *People v. Ramirez,* 141 Cal. App. 4th at 1507; quoting, *People v. Dena,* 25 Cal.

App. 3d at 1012–1013; quoting *People v. McGarvy,* 61 Cal. App. 2d at 564. Thus the closest thing to a required "prejudice" showing is that the defendant's case must be in some sense triable; otherwise, the rule – foreshadowing Judge Posner's observations in *DeBartolo*, discussed above and reiterated below – assumes that, if the defendant is willing to "roll the dice" by withdrawing his plea within the short statutory period, he would have refused the bargain initially had he not been "surprised" or "influenced" by factors unknown at the time.

Respondent assumes – with neither supporting explanation nor citation to precedent – that it is free to impose the test employed by this Court in a related (but analytically different) context, namely, where the trial court has failed to give the advisement required under section 1016.5. In those cases, the Court requires the defendant to show that it is "'reasonably probable he or she would not have pleaded guilty if properly advised.'" *Martinez*, 57 Cal.4th at 559; discussing, *Zamudio*, 23 Cal.4th at 210. It is unnecessary to debate the logic of this unheralded appropriation: Assuming, *arguendo*, that the Court decides to import the same test into this different context, Respondent's argument still fails.

All of Respondents contentions in this regard were, again, addressed in detail in the Traverse (at pp. 26-34). Petitioner organized the evidence into four basic points, supporting his sworn statement that he would not have entered the plea had he known the truth:[12]

[12]As the Court may observe, two of those points – the fact that Petitioner had a triable case, and the fact that he is now willing to take the same risks he faced prior to his plea (despite having given the State the benefit of *its* bargain) – also respond directly to the accepted section 1018 standard, discussed above.

(a) *The extraordinarily harsh immigration consequences* – alone or coupled with the (intertwined) loss of his nursing license – *were arguably worse than the penal consequences* he was likely facing. On the one hand, as this Court has reiterated, "preserving [the] right to remain in the United States may be more important . . . than any potential jail sentence," to a noncitizen defendant, who "may view immigration consequences as the only ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges." *People v. Martinez*, 57 Cal. 4th at 563-64; quoting, *Padilla,* 559 U.S. at 364, 368. That observation certainly rings true for Petitioner, who has spent his entire adult life in this country, and would lose his home, his community and his profession if deported. On the other hand, Respondent's talk of the severity of the possible criminal penalty Petitioner was facing is almost certainly overblown. Petitioner was a middle-aged nurse with absolutely no criminal record or history of drug use, and the evidence regarding what Respondent terms "the most serious charge of transportation or sale of methamphetamine" came down to the fact that a very small quantity (1.2 grams) of that substance was found in his car. See, *People v. Asghedom* (2015) 243 Cal.App.4th 718, 726 [observing, in case in which noncitizen defendant was apprehended with "10 to 15 rocks of cocaine" and a loaded handgun, that "as defendant had no prior criminal record whatsoever, a disposition other than probation was highly unlikely."].

(b) *The case against Petitioner was eminently triable.* In regard to the "eluding an officer" charge, Respondent refers to "damning video evidence" of Petitioner's "dangerous driving." But that evidence – now before the Court in the *habeas* case as Petitioner's Exhibit

G – would in fact have exonerated him. It shows that Petitioner was extremely confused and disoriented, almost completely unable to control either the car he was driving or his bodily movements after he stopped, and unable to respond effectively to the most basic questions and orders from the police. He clearly appeared to be wildly intoxicated – but it is undisputed that the tests for both alcohol ingestion and illegal substances came back negative. Respondent asserts – with neither citation nor analysis – that Petitioner "was not so unconscious as to lack intent for his lengthy evasion of the police." (Answer at 31). But legal "unconsciousness" is precisely what the evidence points to, and it would have been a complete defense to the "eluding an officer" charge. *See*, *People v. Halvorsen* (2007) 42 Cal. 4th 379, 417 ["Unconsciousness, if not induced by voluntary intoxication, is a complete defense to a criminal charge. To constitute a defense, unconsciousness need not rise to the level of coma or inability to walk or perform manual movements; it can exist where the subject physically acts but is not, at the time, conscious of acting.'"] (citations omitted); *People v. James* (2015) 238 Cal. App. 4th 794, 805 ["The law is clear that in cases of unconsciousness caused by blackouts, involuntary intoxication, sleepwalking, or even epilepsy, an instruction is warranted where there is substantial evidence."]

Just as the drug possession case against Petitioner was greatly bolstered by what appeared to be his evident extreme intoxication, the case as to those charges would lose considerable force once it was established that he was not intoxicated at all, but rather suffering from a temporarily disabling medical condition. It would no longer be an automatic inference that the box with small amounts of drugs found in Petitioner's car was

indeed his – especially given that there was independent evidence that it had been left in his car by an acquaintance, identified by name, to whom he had given a ride. (*See*, CT 46). Respondent asserts that "[w]ith regard to the controlled substances, the defense that 'the other dude did it' is rarely successful . . . ."[13] (Answer at 31). Respondent offers no foundation for that assertion beyond *ipse dixit*, but even assuming it is true in most cases, this was not "most cases." Again, Petitioner was and is a respected – and apparently much admired – member of his community who had gotten through 40 years of his life without any encounters with law enforcement and who had no history of drug abuse. (*See*, CT 51-65).

A juror, or indeed the entire jury, could well have entertained a reasonable doubt about Petitioner's guilt – but the issue here is not whether Petitioner would have won acquittal. Rather, as this Court has taught, the question is whether Petitioner himself could reasonably have believed that he had a fair chance of prevailing at trial, and made his decision regarding a guilty plea accordingly. *Martinez*, 57 Cal.4th at 567. There was ample reason for Petitioner to believe that his case was triable.

(c) *There was very good reason to expect that an alternative plea bargain could have been reached.* As the Court has explained, Petitioner can also demonstrate "prejudice" by showing that he would have refused the plea agreement "on the hope or expectation of negotiating a different bargain without immigration consequences." *Martinez*, 57 Cal.4th at 567. And as discussed in the Petition for Review, there was (and is) a perfectly plausible

[13]It is unclear why Respondent elected to employ this quaint patois, but undersigned counsel – having been acquainted with Petitioner Ryan Patterson for a while now – very much doubts that he would ever have said "the other dude did it."

alternative disposition: A guilty plea to "accessory after the fact" (Penal Code §32) to the identical drug possession offense (Health & Safety Code §11377(a)) would have carried the same legal weight and the same sentence– but without the terrible immigration results for Petitioner. Petitioner (if he had competent representation) would have had every reason to believe that such an alternative would have been acceptable to the prosecution.[14]

(d) *The extraordinary efforts Petitioner is making now to undo his plea is persuasive evidence that he would not have accepted it in the first instance.* This final point – raised in the Petition for Review, but ignored in the Answer Brief – was best articulated by Judge Posner in another case in which a noncitizen defendant unknowingly entered a guilty plea that led to an immigration catastrophe: "[Petitioner] unquestionably wants to roll the dice, which 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." *DeBartolo v. United States*, 790 F.3d at 778.

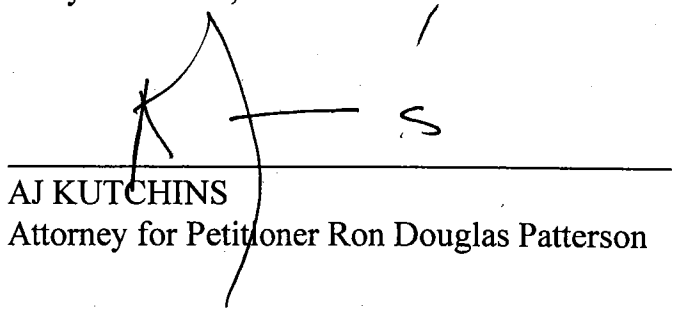
[14]Although Respondent disputes this point in its Return in the accompanying *habeas corpus* action (and those arguments are, in turn, dispatched in Petitioner's Traverse) no mention is made of the point in the Answer Brief filed in this case.

CONCLUSION

Petitioner has shown that his guilty plea came about as the result of his ignorance of the disastrous immigration and professional consequences that would result and that these was thus "good cause" for him to withdraw it. *Giron*, 11 Cal.3d 796-97. He has also demonstrated a reasonable probability that, if properly advised, he would have rejected the plea bargain. See, *Martinez*, 57 Cal.4th at 567. And he has shown that the trial court's decision to reject his motion to withdraw that plea was the result of a misunderstanding of applicable legal principles, and thus an abuse of discretion. Accordingly, the judgment should be vacated and the case remanded to the Superior Court with instructions to permit Petitioner to withdraw his guilty plea.

Dated: February 15, 2016

Respectfully submitted,

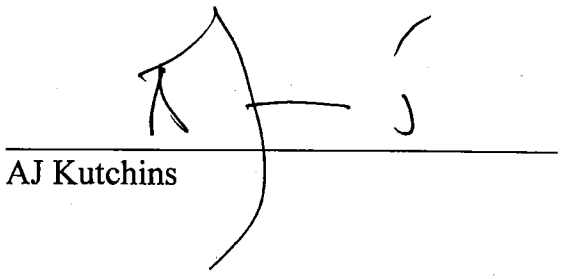


AJ KUTCHINS
Attorney for Petitioner Ron Douglas Patterson

CERTIFICATION REGARDING LENGTH OF PETITION

Undersigned counsel hereby certifies that the attached Petitioner's Reply Brief contains 7,541 words, exclusive of tables, appendices and caption.

Dated: February 15, 2016



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 February 16, 2016, I served the enclosed Petitioner's Reply 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:

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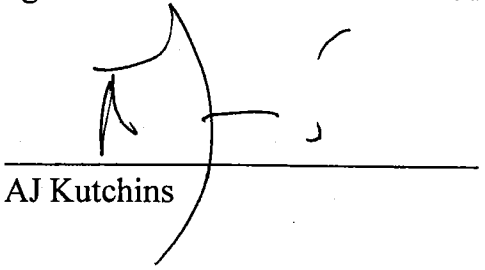
I declare under penalty of perjury that the foregoing is true and correct. Executed on February 16, 2016, at Berkeley, California.



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