LIU, J.

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SUPREME COURT NO. S199495

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. **RODRIGO MARTINEZ MARTINEZ,** Defendant and Appellants	Court of Appeal No. H036687 (Santa Clara County Superior Court Case No.: 156569)

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA
HONORABLE ANDREA BRYAN, JUDGE PRESIDING

APPELLANT'S PETITION FOR REVIEW

SARA E. COPPIN
(State Bar. No. 245952)
In association with
THE SIXTH DISTRICT
APPELLATE PROGRAM
11075 Treehenge Lane
Auburn, CA 95602
(530) 401-6891 (phone)
Counsel for Appellant

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SUPREME COURT NO. S199495
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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to rules 8.368 and 8.500 of the California Rules of Court, defendant and appellant Rodrigo Martinez Martinez petitions this Court for review of the unpublished decision of the Court of Appeal, Sixth Appellate District, filed December 9, 2011 in case number H036687, affirming the judgment. The Court of Appeal's opinion is attached to this petition as Appendix "A." No petition for rehearing was filed.

ISSUE PRESENTED FOR REVIEW

Whether, when the trial court fails to deliver immigration advisements mandated by Penal Code section 1016.5 prior to accepting a defendant's plea of guilty, an abuse of discretion has occurred when the court denies a motion to vacate the plea for lack of prejudice after considering only the appellant's likelihood of success at trial, and disregarding evidence supporting the defendant's contention that, had he been properly warned, he could have obtained an immigration-neutral disposition, and that he would have preferred his chances at trial over a certainty of deportation.

NECESSITY FOR REVIEW

Pursuant to rule 8.500(b) of the California Rules of Court, the issues presented herein merit review to secure uniformity of decision among the appellate courts and to settle important issues of law. In the context of a Penal Code section 1016.5 motion to vacate based on the trial court's failure to deliver warnings about immigration consequences of a plea, this Court has previously held that "the sentencing court must determine whether the error prejudiced the defendant, i.e., whether it is 'reasonably probable' the defendant would not have pleaded guilty if properly advised." *People v. Superior Court (Zamudio)*, 23 Cal. 4th 183, 210 (2000). Following that decision, the Court of Appeal for the Second District held that to show prejudice, a defendant was not required to demonstrate a

probability of a favorable outcome at trial, but that a likelihood of success at trial may be one factor to consider in assessing whether a defendant would have rejected a plea offer. *People v. Castro-Vasquez*, 148 Cal. App. 4th 1240 (2007). In This Court has yet to provide guidance to lower courts on what factors should be considered to determine when it is "reasonably probable" that a defendant would not have pled if properly advised pursuant to Penal Code section 1016.5.

In *Padilla v. Kentucky* (2010) 130 S.Ct. 1473, the United States Supreme Court recently recognized that "[p]reserving a client's right to remain in the United States may be more important to the client than any potential jail sentence," and that "informed consideration of possible deportation can only benefit both the State and non-citizen defendants during the plea-bargaining process." (*Id.* at p. 1483, 1486.) That Court's position is very much in accord with the California Legislature's intent in enacting Penal Code section 1016.5, which was to "promote fairness" for non-citizen defendants. (Penal Code § 1016.5, subd. (d).) Accordingly, the legislature included a requirement that such defendants be given "a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant's counsel was unaware" of the immigration consequences of a plea. (*Ibid.*)

The decisions of the lower courts in this case are in conflict with the Court of Appeal's decision in *People v. Castro-Vasquez, supra*, 148 Cal.

App. 4th 1240, and are not in accord with the concerns expressed by the California Legislature in Penal Code section 1016.5, or the United States Supreme Court in *Padilla v. Kentucky, supra*, 130 S.Ct. 1473. In this case, the trial court denied appellant's motion to dismiss, upon finding that appellant failed to demonstrate that he was prejudiced by the lack of immigration advisements before he entered a guilty plea. Specifically, the trial court found it "highly improbable" that Mr. Martinez would have been able to negotiate a plea that would not have had adverse immigration consequences, based on the assumption that only a lesser charge would have been immigration-neutral. (1 Clerk's Transcript ("CT") 92.) The court also found that it was "unlikely" that Mr. Martinez would have been found not guilty by a jury, had he elected to exercise his trial rights. (*Id.*) The Court of Appeal subsequently affirmed, agreeing with the trial court that appellant would have been convicted by a jury had he gone to trial, and that it was "entirely speculative" that appellant would have agreed to a greater potential prison sentence in exchange for an immigration neutral plea. The Court of Appeal therefore concluded that appellant had failed to demonstrate prejudice. (Typed opinion ("opn.") at p. 3.)

This Court should provide guidance to lower courts that (1) affirms the Court of Appeal's decision in *Castro-Vasquez, supra,* 148 Cal. App. 4th 1240, that a defendant does not have to demonstrate a likelihood of success at trial to demonstrate prejudice; (2) includes the possibility of obtaining an

alternative, immigration-neutral disposition as a factor in assessing prejudice in the Penal Code section 1016.5 context; and (3) takes into account the reality that for many non-citizen defendants, avoiding deportation is more important than any potential jail sentence. Without such guidance, the issues in this case are likely to frequently reoccur. Review should therefore be granted.

STATEMENT OF THE CASE

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

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

exercise his trial rights rather than plead guilty. (*Id.*) Based on these two findings, the court held that appellant had not established that the trial court's failure to warn him about the immigration consequences of his plea had prejudiced him in any way, and denied appellant's motion to vacate. (*Id.*)

On March 10, 2011 appellant filed a notice of appeal and a certificate of probable cause was issued on March 11, 2011. (1 CT 95-96.) On December 9, 2011 the Court of Appeal, Sixth District, quoting the decision of the Superior Court at length, affirmed. (Typed opn., pp. 3-4.)

STATEMENT OF THE FACTS

For purposes of this petition for review only, petitioner adopts the statement of facts set forth by the Court of Appeal in its opinion. (Typed opn., pp. 1-2.)

ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE DECISION BELOW AND THE COURT OF APPEAL'S DECISION IN *PEOPLE V. CASTRO VASQUEZ* ABOUT WHETHER THE LIKELIHOOD OF SUCCESS AT TRIAL CAN BE DETERMINATIVE OF WHETHER A DEFENDANT WAS PREJUDICED BY A TRIAL COURT'S FAILURE TO DELIVER PENAL CODE SECTION 1016.5 ADVISEMENTS, AND TO INSTRUCT LOWER COURTS TO CONSIDER THE POSSIBILITY OF OBTAINING AN IMMIGRATION-NEUTRAL DISPOSITION AS A FACTOR IN ASSESSING PREJUDICE IN THE PENAL CODE SECTION 1016.5 CONTEXT.

"To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement." (*People v. Totari* (2002) 28 Cal.4th 876, 884.) To show prejudice, a defendant must show that it is "reasonably probable that he would not have pleaded guilty if properly advised." (*People v. Castro-Vasquez*, *supra*, 148 Cal.App.4th at p. 1244; see also *Zamudio, supra*, 23 Cal.4th at p. 210.) The appropriate standard of review of a denial of Penal Code section 1016.5 motion is abuse of discretion. (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1517 (citing

Zamudio, supra, 23 Cal.4th at p. 192) see also *People v. Shaw* (1998) 64 Cal.App.4th 492, 495–496; Pen. Code § 1016.5, subd. (c).)

In this case, appellant pled guilty to one count of violating Health and Safety Code section 11360, subdivision (a), transportation of marijuana. (1 CT 28.) He was not advised by the trial court or counsel prior to entering his plea that it could result in his expulsion, denial of admission, or denial of naturalization. (*Id.*; see also 1 CT 44-45.) By agreeing to plead guilty to the crime of transportation of marijuana, appellant unknowingly guaranteed his permanent expulsion from this country.[1]

A. Focusing Only On a Likelihood of Success At Trial Cannot Be the Appropriate Test for Assessing Prejudice in the Context of a Section 1016.5 Motion, Where the Correct Inquiry Involves Determining What A Properly Warned Defendant Would Have Done, And Success At Trial May Have Been Only One Factor Considered By the Defendant.

In the decision below, the Court of Appeal found no abuse of discretion in the trial court's denial of appellant's Penal Code section

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

1016.5 motion, and affirmed. Using the same inquiry relied upon by the trial court, the Court of Appeal focused on appellant's likelihood of success at trial to determine whether appellant was prejudiced by the lack of section 1016.5 warnings, noting simply that "[t]he jury would not have taken long. The observation of a hand to hand sale together with the money and the purchaser would not have offered any difficulty to a jury." (Typed opn., p. 3.) The decision gave no consideration whatsoever to the facts in evidence which support appellant's contention that, had he been properly warned of the immigration consequences, he would have preferred his chances at trial over certain deportation from the United States. In so doing, the Court of Appeal disregarded its sister district's opinion in *People v. Castro-Vasquez, supra,* in which the court held that demonstrating a likelihood of success at trial is not required to show prejudice, and that "the probable outcome of a trial [is] *one factor* a court could consider in *assessing the likelihood that a defendant would have rejected a plea offer.*" (148 Cal.App.4th at p. 1245 (emphasis added).)

Reasonable minds have differed throughout these proceedings as to the strength of the prosecution's case. However, the Court of Appeal's failure to address *any* evidence that the prosecution's case was not airtight further demonstrates that it did not conduct the appropriate inquiry into the likelihood that appellant would have rejected the plea offer if properly warned. The record clearly demonstrates that there were weaknesses in the

prosecution's case sufficient to persuade a properly warned defendant to choose to go to trial if an immigration-neutral plea could not be reached. As appellant's trial counsel pointed out:

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

(1 Reporter's Transcript ("RT") 7.) Even the District Attorney acknowledged that there were "weaknesses" in the prosecution's case that could lead to an acquittal. (1 RT 9.) The trial court should have considered evidence of the strengths *and weaknesses* of the prosecution's case, and weighed them against the certainty of deportation appellant faced by accepting the plea offer, as a properly warned defendant would have done. Only then would the court actually be able to determine if it is reasonably probable that appellant would have chosen to exercise his trial rights had he been properly warned. Because court failed to conduct the appropriate inquiry, the denial of appellant's motion to vacate was an abuse of discretion.

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B. Courts Must Consider Evidence That An Immigration-Neutral Alternative Disposition Could Have Been Available To A Defendant Had He Been Made Aware of the Possibility of Severe Immigration Consequences Flowing From His Plea.

The Court of Appeal further erred by dismissing out of hand appellant's contention that, had he been properly warned pursuant to Penal Code section 1016.5, appellant would have offered to "plead up" to the more serious charge of Health and Safety Code section 11352, subdivision (a). (*People v. Bautista* (2004) 115 Cal.App.4th 229, 240; see also Typed opn., p. 3.) Health and Safety Code section 11352, subdivision (a), California's other "transportation" statute, is more serious than transportation of marijuana, in that it exposes the defendant to state prison sentences of "three, four, or five years," as opposed to the "two, three or four years" a defendant is exposed to under Health and Safety Code section 11360, subdivision (a). However, unlike Health and Safety Code section 11360, subdivision (a), which is specific to marijuana, Health and Safety Code section 11352, subdivision (a) involves the transportation of "any controlled substance." This is significant because, where a defendant pleads to the plain statutory language of Health and Safety Code section 11352, subdivision (a) – wherein the type of drug is not specified, the resulting conviction cannot be considered an offense relating to a controlled substance "as specified in section 802 of title 21" of the United States Code (also cited as "Section 102 of the Controlled Substances Act" ("CSA")).

Because it cannot be considered a controlled substance offense under the CSA, it does not trigger immigration consequences. (See *Ruiz-Vidal v. Gonzales* (9th Cir. 2007) 473 F.3d 1072, 1078.) However, by simply concluding that it is "entirely speculative . . . that [appellant] would have agreed to go to state prison for a term of three, four or five years had he known of the immigration consequences," the Court of Appeal misapprehends appellant's argument and the facts of this case, and assumes an unreasonable outcome, in error.

The negotiated disposition in this case required appellant to plead guilty to a charge which exposed him to up to four years in prison, however his actual sentence was three years of formal probation, a time-served jail term of 111 days, a fine, counseling, and registration requirements. (1 CT 92.) Given that sentence, it is highly unlikely that either the prosecutor or the trial court would have suddenly insisted on a prison sentence, as the decision below assumes, had appellant offered to plead up to Health and Safety Code section 11352, subdivision (a). In fact, what "beggars the imagination" is why such disparate treatment would be expected. (Typed opn., p. 3.) Under *Strickland v. Washintgon* (1984) 466 U.S. 668, 695, this Court must consider the issue of prejudice in the abstract without regard to "unusual propensities toward harshness or leniency" on the part of a particular decision maker. In *Hill v. Lockhart* (1985) 474 U.S. 52, the Court cited *Strickland* for the proposition that an assessment of prejudice should

be based upon a "reasonable decision maker." The decision below presupposes an unreasonable decision maker would insist on a prison term in exchange for appellant's plead up to an immigration-neutral charge, despite the initial offer of a no-prison sentence, and is therefore erroneous as a matter of law.

By contrast, there is nothing unreasonable or improbable about appellant's position that he would have been willing to serve "additional jail time" in exchange for an immigration-neutral plea. (1 CT 78.) As the United States Supreme Court has long recognized, the consequence of deportation is particularly severe, because it is "the equivalent of banishment or exile." *Delgadillo v. Carmichael* (1947) 332 U.S. 388, 390-391. In *Padilla v. Kentucky, supra,* 130 S.Ct. 1473, the Court declared that "as a matter of federal law, deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." (*Id.* at p. 1479.) Accordingly, "[p]reserving a client's right to remain in the United States *may be more important to the client than any potential jail sentence*." (*Id.* at p. 1483, citing *INS v. St. Cyr* (2001) 533 U.S. 289, 323.) The Court of Appeal fails to acknowledge this reality in its assessment of whether it is reasonably probable that appellant would have accepted a greater custodial sentence in exchange for an immigration-neutral disposition, in error.

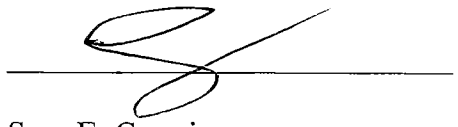
The decision below reveals a conflict among the lower courts as to the appropriate inquiry to assess prejudice in the context of a motion to vacate pursuant to Penal Code Section 1016.5. Specifically, the decision below focuses on appellant's likelihood of a success at trial, but the Court of Appeal in *People v. Castro-Vasquez, supra*, held that success at trial is only one factor courts should consider when determining prejudice. (148 Cal. App. 4th 1240.) This Court should therefore grant review to resolve the conflict, and to instruct future courts that the possibility of obtaining an alternative, immigration-neutral disposition must be a factor considered in determining prejudice.

CONCLUSION

For the reasons given herein, this court should grant review.

Dated: January 17, 2012

Respectfully submitted,

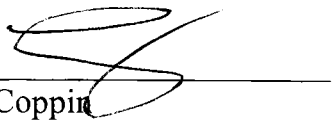


Sara E. Coppin
Attorney for Defendant
and Appellant

CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 8.504(d)(1), I hereby certify the number of words in Appellant's Petition for Review is 3,152 based on the calculation of the computer program used to prepare this brief. The applicable word-count limit is 8,400.

Dated: January 17, 2012



Sara E. Coppin

APPENDIX "A"

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

RODRIGO MARTINEZ MARTINEZ,

Defendant and Appellant.

H036687
(Santa Clara County
Super. Ct. No. 156569)

An undercover officer, Frank Estrada standing about four feet away from Rodrigo Martinez-Martinez, saw him exchange a brown bindle for money with a Mr. Ryan. The officer detained Ryan and found the brown bindle in his hand. It was marijuana. Ryan gave appellant $8.00. About an hour later the officer saw appellant and arrested him. He was charged with a violation of Health and Safety Code section 11360, subdivision (a). He pled guilty to the charge and served 111 days in jail and was ordered to register as a narcotics offender. Fifteen years later he moves, pursuant to Penal Code section 1203.4, for a record clearance or in the alternative to have his charge reduced to a misdemeanor.

The motion for record clearance was granted. In January of this year appellant filed a motion to vacate the conviction based on the failure to advise him of the immigration consequences of his plea. Appellant asserted that he had never been advised of the immigration consequences either by the court or his attorney. He also claims that

he did not learn of them until 2010 when he applied for an adjustment of status to lawful permanent residency with the United States Citizenship and Immigration Service. That application was denied based on the drug conviction.

A record of his preliminary hearing of June 5, 1992, as well as his July 28, 1992 plea are gone. 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 relating to advice of immigration status. His motion was denied and he appeals to us and says that the trial court abused its discretion in denying the order.

We find no abuse of discretion and no error. The trial court's denial of the motion was supported by written ruling which we set out at length.

"Defendant's motion under P.C. 1016.5 is DENIED.

"Defendant correctly lists the necessary concomitants for relief.

"(1) Defendant has established that he may rely on a rebuttable presumption that the advisement regarding immigration consequences was not given before he entered his plea.

"(2) Defendant must establish that at the time of this motion, there exists more than a remote possibility that the conviction will have one or more of the adverse immigration consequences specified in the statute.

"He has done that by declaration of his present counsel that defendant's conviction for sale of marijuana renders defendant inadmissible to the United States; renders him ineligible to naturalize to United States citizenship because the conviction precludes him from attempting to demonstrate 'good moral character.'

"(3) Defendant has attempted to demonstrate 'prejudice' by declaring that had he been aware of the immigration consequences of his plea he would not have entered it. Instead, defendant declares that he would have insisted upon a plea agreement 'that

would have spared him such immigration damage' or he would have exercised his right to a jury trial.

"The plea agreement he agreed to on July 28, 1992 was: For a plea of guilty to Health & Safety Code section 11360 subdivision (a); he would be placed on formal probation for three years and would be given a time-served jail term of 111 days, a fine, counseling, and registration as a narcotics offender. This Court finds it highly improbable such a bargain would have been offered.

"Even more unlikely was a verdict of not guilty. The arresting officer testified at the preliminary hearing that he was only four feet away from the sale and saw defendant hand the buyer a baggie and saw the buyer hand defendant paper money. The officer immediately arrested the buyer and found on him a baggie of marijuana. Less than an hour later defendant was found without any contraband. Unless a jury found the officer to be a liar, it is hard to believe he could not see what he testified he witnessed at a distance of four feet: Defendant handing a baggie of marijuana to the buyer and concurrently being handed cash by the buyer. Nor would it be difficult for a jury to determine what defendant did with the money or additional contraband: He had an hour to dispose of it and he knew the police would be looking for him."

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.

DISPOSITION

Judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.

People v. Martinez Martinez
H036687

DECLARATION OF SERVICE

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

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

On January 18, 2012, I served the within

APPELLANT'S PETITION FOR REVIEW

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

Attorney General
455 Golden Gate Ave
Room 11000
San Francisco, CA 94102

Rodrigo Martinez-Martinez
c/o Enrique Ramirez
825 Van Ness Ave., Ste 304
San Francisco, CA 94109

District Attorney
Santa Clara County
70 West Hedding Street, West Wing
San Jose, CA 95110

Santa Clara County Superior Court
191 N. First Street
San Jose, CA 95113

Sixth District Appellate Project
100 N Winchester Blvd., Suite 310
Santa Clara, CA 95050

Sixth District Court of Appeal
333 West Santa Clara Street, Ste.1060
San Jose, CA 95113

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

Executed on January 18, 2012, at Auburn, California.

SARA E. COPPIN