S199339

No.

CRC 8.25(b)

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	Supreme Court No.
Plaintiff and Respondent,	)	
v.	)	Court of Appeal No. B225443
VICTOR D. ARRIAGA,	)	L.A. Sup. Ct. No. A537388
Defendant and Appellant.	)	

2nd **PETITION FOR REVIEW**

Following decision of the Court of Appeal
Second Appellate District, Division Two

On Appeal from the Los Angeles Superior Court
The Honorable Steven D. Blades, Judge

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By Appointment under the
California Appellate Project
Independent Case System

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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Petitioner, appellant and defendant Victor D. Arriaga petitions this Honorable Court for review following the published decision of the Court of Appeal, Second Appellate District, Division Two, which affirmed the denial of appellant' s motion to vacate his guilty plea made pursuant to Penal Code, section 1016.5. (*People v. Arriaga* (2011) 201 Cal.App.4th 429.)

The Court of Appeal opinion, filed December 1, 2011, is attached as Exhibit A. Appellant's petition for rehearing was denied on January 3, 2012.

ISSUE PRESENTED

Penal Code, section 1016.5 requires the court, before accepting a guilty plea, to advise the defendant of three specific immigration consequences of his plea. The statute also provides that if the plea record does not show the court gave the required advisements, a presumption arises that the advisements were not given. "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." (§1016.5, subd. (b).)

Can the People overcome the presumption that advisements were not given by a mere preponderance of the evidence? Or do the near certain consequences flowing from denial of the motion to vacate – removal, exclusion and/or de-naturalization – require the presumption be overcome by a heightened standard of proof by "clear and convincing" evidence?

STATEMENT OF THE CASE AND FACTS

In 1986, appellant was charged jointly with Marcus Sandaval Aranda with one count of possessing a sawed-off shotgun, in violation of Penal Code, section 12020 (a). (CT 1.) He pled guilty prior to preliminary hearing and was granted probation. (CT 3-7.) At the time, he had been a lawful permanent alien for six years. (CT 23.) Two decades later, after raising a family, leading a productive life as a chef, and actively participating in his community, he applied for citizenship. (CT 23-24, 33; RT 14-16.) But instead of being granted it, appellant was ordered to appear for deportation due to his old firearm conviction. (RT 15-16.)

Appellant filed a motion to vacate his conviction under section 1016.5, stating in his declaration that he was never told he could be separated from his

family and work if he pled guilty and, had he been told, he would have gone to trial because he was not guilty, or he would have pled to a non-deportable offense.[1] (RT 15-16.)

There was no reporter's transcript of the proceedings, and the reporter's notes had been destroyed pursuant to statute. (RT 80-81.) Thus the only objective evidence to support appellant's position was unavailable, through no fault of his own.

The parties agreed that the minute order of the proceedings was also insufficient to constitute a record that defendant was properly advised; it was a pre-printed form with the box checked next to "Defendant advised of possible effects of plea on any alien or citizenship/probation or parole status." (CT 4, 81.)

The parties agreed that the statutory presumption the advisements were not given arose. (RT 22, 25, 34.) To rebut the presumption, the prosecutor called the former district attorney, Mr. Hofman, as a witness, who testified to a "custom and habit" of always advising all defendants of the three immigration consequences when he took guilty pleas. (RT 2-10) Mr. Hofman had no

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[1]Defendant's firearm conviction subjects him to removal. (8 U.S.C. §1227, subd. (a) (2) (c).) Both currently and at the time of his plea, Penal Code, section 12020 (a) included both firearm and non-firearm possession offenses within its prohibition. Thus appellant could have escaped deportation by negotiating his plea to a non-firearm possession conviction under that same statute.

recollection of appellant, had no notes in his file, and never used a card to ensure all advisements were given and given correctly. (RT 3, 7, 11.) There was no evidence indicating that Mr. Hofman, the plea judge or trial counsel even knew appellant was not a citizen. Though the clerk had modified the pre-printed minute order form extensively with handwritten changes to accurately reflect the proceedings that took place that day, the clerk did not mark the minute order in a way that would confirm what Mr. Hofman testified to occurred. (CT 81.)

The trial court found the presumption was rebutted by a preponderance of the evidence and denied the motion. (CT 84-86.) The Court of Appeal affirmed, rejecting appellant's claim that, given the important interests at stake, the statutory presumption could only be overcome by clear and convincing evidence.

REVIEW IS NECESSARY TO SETTLE AN IMPORTANT QUESTION OF LAW (Cal. Rules of Court, Rule 5.800.)

This Court has addressed a number of interpretive issues under Penal Code, Section 1016.5. (See *People v. Totari* (2002) 28 Cal.4th 876, 887 [denial of a section 1016.5 motion is appealable as a post-judgment order affecting the defendant's substantial rights]; *In re Resendez* (2001) 25 Cal.4th 230 [ineffective

assistance claim based on trial counsel's failure to advise defendant of immigration consequences not cognizable in section 1016.5 proceeding]; *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 199-200 [defendant must demonstrate prejudice from non-advisement].)

This petition asks, what standard of proof is required to overcome the statutory presumption of non-advisement that arises when there is no record showing the defendant was told of the adverse immigration consequences he might suffer upon pleading guilty? Section 1016.5 defines when the presumption will be raised, but it does not state what standard of proof is required to rebut it. The choice of a standard of proof, where a statute is silent, is a judicial function to be resolved after evaluating the policy considerations applicable to the issue. (*Woodby v. Immigration Service* (1966) 385 U.S. 176, 184 [17 L.Ed.2d 362, 368, 87 S.Ct. 483]; *People v. Burnick* (1975) 14 Cal.3d 306, 314.) It serves to allocate the risk of error between the parties, and varies in proportion to the gravity of the consequences of an erroneous resolution. (*People v. Burnick, supra,* at p. 310.)

The Court of Appeal held that the People can overcome the statutory presumption by a mere preponderance of the evidence - that quantum of evidence necessary to establish negligence in a civil tort action. In standard of proof parlance, this means the Court of Appeal placed the risk of error in the factual

determination that advisements were given upon the parties in roughly equal fashion. (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 488.) However, the stated purpose of the statute is to protect one party – the non-citizen defendant – from entering into a plea without being informed of what is to him probably the most important consequence of all, his ability to remain in the United States. (Pen. Code, §1016.5, subd. (d).) Moreover, the Legislature has already manifested its intent that the interest of the defendant in ensuring his guilty plea was fully informed outweighs the State's interest in the finality of pleas, since the absence of a record showing the defendant was fully advised gives rise to a presumption against the State, regardless of why the record does not exist, and no matter how long after the plea the motion to vacate is brought.

The Court of Appeal rejected appellant's claim that an elevated standard of proof was required, finding the interest of the State in the finality of judgments was equal to, if not outweighed, the defendant's interests. It reasoned that due process requires an elevated standard of proof only when the government deprives an individual of a liberty or property interest, and "the outcome of this proceeding would not and did not result in the deprivation of a liberty or property interest." (Slip Opinion, p. 8.)

This turns a blind eye to what prompts a defendant to file a motion to vacate

in the first place. It is not because there is some theoretical possibility that his conviction might cause removal in the unknown future. It is because, as was the case with Mr. Arriaga, Mr. Totari, Mr. Resendiz, and Mr. Zamudio, and countless others, removal proceedings have already begun and denial of the motion is therefore relatively certain to result in banishment and the loss of all that is important to the defendant. That Mr. Arriaga's situation is likely to recur as vigorous enforcement of immigration laws against aliens with criminal convictions continues, no matter how stale the conviction, is reflected in ICE's own statistics. According to its web site, the fiscal year ending July 2011 saw 216,698 non-citizens removed, with 55% of them having criminal convictions, "the largest number of criminal aliens removed in agency history." (www.ice.gov/removal-statistics.) Almost 6,000 were from Los Angeles County, alone. (www.ice.gov/news/release/1009/100902losangeles.htm.)

The U.S. Supreme Court has already determined that the higher standard of proof applies as a matter of due process where immigration consequences are at issue because the consequences to the defendant are drastic – deportation, expulsion and loss of citizenship. (See, e.g., *Woodby v. INS*, supra, 385 U.S. at p. 286 (deportation); *Chaunt v. United States,* 364 U.S. 350, 353 (1960) (denaturalization): *Schneiderman v. United States,* 320 U.S. 118, 125, 159

(denaturalization).) In *Padilla v. Kentucky* (2010) 130 S.Ct. 1473, the Court re-affirmed that, while removal proceedings are civil in nature, deportation is "unique" because it is "intimately related to the criminal process," is a "particularly severe penalty," and is "most difficult" to "divorce the penalty from the conviction in the deportation context." (Id. at p. 1482.)

The clear and convincing standard of proof is also no stranger in the guilty plea context. Penal Code section 1018 requires a defendant who seeks to challenge a plea valid on its face on the ground it was not entered into knowingly and voluntarily to prove that by clear and convincing evidence. (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) This Court should not hesitate to impose a corresponding standard of proof on the People when it challenges a plea that, by operation of section 1016.5, is presumptively invalid.

Even in the civil context, a clear and convincing standard of proof applies across a range of issues where constitutional rights are not involved, but due to general public policy considerations that involve important interests. (See, e.g., *DRG/Beverly Hills Ltd v. Chopstix Dim Sum Café & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [waiver of known right under a commercial contract must be shown by clear and convincing evidence]; *Estate of Coffin* (1937) 22 Cal.App.2d 469 [waiver of right to a family allowance]; *Lynch v. Lichtenhaler* (1948) 85

Cal.App.2d 437, 441 [oral agreement to make a will]; *People v. Englebrecht* (2001) 88 Cal.App.4th 1236 [issuance of injunction in gang case].) The interest of a criminal defendant as reflected in section 1016.5 deserves no less protection.

The unique problem presented by the silent record case led this Court to apply a clear and convincing standard of proof in *People v. Jiminez* (1978) 21 Cal.3d 595. This Court was faced with establishing the standard of proof for determining the admissibility of a confession where doubt existed as to its voluntariness. In determining whether a confession was voluntary, it stated that the trial court "will often have to decide which one of two self-serving accounts to believe, as the testimony normally presented . . . consists of conflicting versions by the defendant and law enforcement officers as to what occurred during the interrogation of the defendant by those officers which led to the defendant's confession." (Id at p. 606) Because this presented a factual inquiry, "the degree of certainty as to which a trial court must be convinced that a confession is voluntary will often be of controlling significance" and that under a preponderance of the evidence test, the trial court "will more often resolve factual conflicts in the evidence in favor of admitting a challenged confession, and this will correspondingly increase the risk that some involuntary confessions will thereby be admitted." (Ibid.) This Court concluded that this weaker standard of

proof was not sufficient, since the consequences resulting from an erroneous determination of the voluntariness issue "are especially severe." (Ibid.) Once the court admits the confession finding it voluntary, the jury does not redetermine that issue. (Evid. Code, §405.) Further, a confession is ordinarily given overwhelming weight by the jury. (Id. at p. 607.)

While *Jimenez* was subsequently abrogated by the "truth-in-evidence" provisions of Proposition 8 (*People v. Markham* (1989) 49 Cal.3d 63, 66), its discussion regarding the undesirability of a mere preponderance of the evidence standard to resolve a factual dispute which pits the testimony of the defendant, which will probably be viewed as self-serving, against that of a government representative applies with equal force to the factual determination in a section 1016.5 hearing. As one commentator has observed, if the testimony of the plea judge (or here, the district attorney) under a "preponderance of the evidence" standard of proof is sufficient to overcome the statutory presumption the defendant has not been advised due to a destroyed or insufficient record, the remedy envisioned by section 1016.5 is "illusory" because it is "unlikely that a defendant will ever prevail in a credibility contest that pits his word against that of a trial judge" even though the trial judge's recollection should be viewed with skepticism, for he has a "strong reputational and professional incentive to testify

that he delivered the proper warnings as required by law." (Cody Harris, *A Problem of Proof: How Routine Destruction of Court Records Routinely Destroys A Statutory Remedy,* 59 Stan. L. Rev. 1791, 1812 (2007).) These concerns are increased when, as here, the recollection testimony is by the former district attorney, who additionally has an interest in having a plea he negotiated and secured upheld. "The end result is that it is difficult to imagine a scenario in which a defendant could ever prevail on a section 1016.5 motion without recourse to a plea hearing transcript, rendering the remedy provided under the statute illusory for a significant number of defendants." (Ibid.)

In short, a preponderance of the evidence standard is too low to rebut the presumption that arises under section 1016.5 from a silent or inadequate record, because the consequences to a defendant of an erroneous factual determination that advisements were given is too severe – the defendant will be removed – when weighed against the State's interest in the finality of pleas. A clear and convincing standard protects the very strong interests the individual has in the determination. Society has a considerable interest in the finality of plea convictions, but it has no interest in upholding uninformed and involuntary please.

Moreover, requiring proof by clear and convincing evidence also serves society's interest in having its judicial system comply with rules designed to serve

the judicial system and thereby society as well. For, over 20 years before this plea was entered, this Court made it crystal clear that when statutory guarantees are at issue, "it does not appear to be too great a burden on the trial judges or clerks under their direction to require minute or docket entries specifically listing the rights of which the defendant is actually advised." (*In re Smiley* (1967) 66 Cal.2d 606, 617.)

CONCLUSION

For the foregoing reasons, appellant requests review be granted.

Respectfully submitted,

Date: January 10, 2012

JOANNA REHM

Attorney for appellant
Victor D. Arriaga

CERTIFICATE OF WORD COUNT

I, Joanna Rehm, certify that the Petition for Review is prepared in Times New Roman font, 14-point, and contains 2534 words, exclusive of tables. In making this certification, I am relying on the word count of the computer program used to prepare the brief.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Los Angeles, California on January 10, 2012.

_____

JOANNA REHM

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. VICTOR D. ARRIAGA, Defendant and Appellant.	B225443 (Los Angeles County Super. Ct. No. A537388)

APPEAL from an order of the Superior Court of Los Angeles County. Steven D. Blades, Judge. Affirmed.

Joanna Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Deputy Attorney General, Victoria B. Wilson and Steven D. Matthews, Deputy Attorneys General for Plaintiff and Respondent.

Defendant and appellant Victor Diaz Arriaga (defendant) appeals from an order denying his motion to vacate a judgment entered in 1986 upon a guilty plea. He contends that the trial court erred in finding that he was adequately advised of the potential immigration consequences of his guilty plea. Respondent contends that defendant was required to obtain a certificate of probable cause to bring this appeal, and as he did not do so, the appeal should be dismissed. We conclude that no certificate of probable cause was required, and upon reaching the merits of the appeal, we reject defendant's contentions. Finding that the trial court did not abuse its discretion in denying the motion, we affirm the order.

BACKGROUND

On January 11, 2010, defendant filed a motion to vacate his 1986 conviction in Los Angeles Superior Court case No. A537388, in which he had pled guilty to a violation of Penal Code section 12020, subdivision (a)(8).[1] In support of the motion, defendant submitted his declaration describing the circumstances of his conviction as well as facts regarding himself and his family.[2] Defendant does "not recall being properly advised by the court of the immigration consequences that could result from this conviction when [he] entered [his] plea." He did not know that the plea could result in a permanent separation from his family and work.

The preprinted minute order of the 1986 plea hearing states: "Defendant advised of possible effects of plea on any alien or citizenship/probation status." No reporter's transcript was available, and the reporter's notes had been destroyed. The prosecution presented the testimony of Los Angeles County Deputy District Attorney Harold W. Hofman, Jr. (Hofman), who was the calendar deputy assigned to taking pleas in July 1986 in the department where defendant entered his plea.

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1 All further statutory references are to the Penal Code, unless otherwise indicated.

2 Defendant is a legal resident alien who has lived in the United States for 39 years. His two children, nine grandchildren, and other family members are United States citizens. Defendant is now disabled and lives with his son and daughter-in-law, providing day care for their children.

Hofman did not remember defendant, but testified that when taking pleas, it was his habit to inform the defendants of their rights and consequences of their pleas. Hofman, rather than the judge sitting in that department, would take the waivers himself 99.9 percent of the time. He testified that in addition to explaining the charges and the defendant's constitutional rights, he "always" advised defendants of the immigration consequences of their pleas. He remembered the language he used, and recited it: "There are a number of consequences to your plea. One of those consequences is you may be deported from the country, that is, required to leave the country, after you are convicted of this offense. You may be denied readmission to the United States after you enter your plea. And if you apply for citizenship, that application may be denied."

Defendant testified that he did not recall being made aware that his plea could result in deportation, exclusion, or denial of naturalization, but that if he had been, he would have rejected the plea. Defendant did not remember whether anyone explained the charges to him, and denied that anyone explained his constitutional rights. He subsequently applied for naturalization, but the application was denied due to his conviction, and he received a letter telling him to report to immigration court in April 2011 for deportation proceedings.

The trial court denied defendant's motion upon finding that the required advisements were given when defendant entered his plea, and that the language used by Hofman substantially complied with the language required by section 1016.5. Defendant filed a timely notice of appeal from the order denying his motion, but did not obtain a certificate of probable cause.

DISCUSSION

I. Requirements of section 1016.5

Prior to acceptance of a plea of guilty or nolo contendere, the trial court must give the defendant the following advisement on the record: "If you are not a citizen, you are hereby advised that 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." (§ 1016.5, subd. (a).) A

defendant who was not so advised may move to vacate the judgment and his plea. (§ 1016.5, subd. (b).)

"To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration consequences; and (3) he or she was prejudiced by the nonadvisement. [Citations.]" (*People v. Totari* (2002) 28 Cal.4th 876, 884 (*Totari*); see also *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 192, 199-200 (*Zamudio*).)

II. No certificate of probable cause required

Citing the recent decision in *People v. Placencia* (2011) 194 Cal.App.4th 489 (*Placencia*), respondent contends that the appeal must be dismissed because defendant failed to obtain a certificate of probable cause, as required by section 1237.5.

Section 1237.5 provides that a defendant may not appeal from a judgment of conviction upon a plea of guilty or nolo contendere unless the trial court has executed and filed a certificate of probable cause for the appeal. The court in *Placencia* held as a matter of first impression that section 1237.5 applies to an appeal based on the denial of a section 1016.5 motion to vacate. (*Placencia, supra*, 194 Cal.App.4th at pp. 494-495; see Cal. Rules of Court, rule 8.304(b).)[3] The court's reasoning began with the established exception to section 1237.5, applied to appeals based upon grounds which arose after entry of the plea and do not challenge the validity the plea. (*Placencia*, at p. 493, citing *People v. Johnson* (2009) 47 Cal.4th 668, 678 (*Johnson*); *People v. Mendez* (1999) 19 Cal.4th 1084, 1096.) The court held that the exception did not apply to a section 1016.5

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3 Prior to *Placencia*, appellate courts have heard appeals from orders denying section 1016.5 motions without comment on the requirements of section 1237.5 or the issue of appealability. (E.g., *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 172 [no certificate] (*Gutierrez*); *People v. Suon* (1999) 76 Cal.App.4th 1, 4 [certificate obtained]; *People v. Ramirez* (1999) 71 Cal.App.4th 519, 521 [no certificate] (*Ramirez*); *People v. Gontiz* (1997) 58 Cal.App.4th 1309, 1312 [no certificate], disapproved on other grounds in *Zamudio*, *supra*, 23 Cal.4th at p. 200, fn. 8.)

motion, because such a motion "follows a claimed failure by the trial court to advise the defendant of the immigration consequences of a plea of guilty or nolo contendere which necessarily precedes the entry of the plea and affects the validity of the plea. [Citations.]" (*Placencia, supra*, at pp. 493-494.) The *Placencia* court concluded that because the exception did not apply, a certificate of probable cause was required. (*Id.* at pp. 494-495.) As none was filed in that case, the court dismissed the appeal. (*Id.* at p. 495.)

Defendant contends that the *Placencia* decision begs the question whether an exception to section 1237.5 was required in the first instance. We agree. As the *Placencia* court recognized, the California Supreme Court held in *Totari* that the denial of a section 1016.5 motion is an order made after judgment which affects the substantial rights of the defendant, and thus appealable under section 1237, subdivision (b).[4] (*Totari, supra*, 28 Cal.4th at p. 887.) Under subdivision (a) of section 1237, appeals taken from a final judgment of conviction are made expressly subject to section 1237.5. There is no such condition in subdivision (b) of section 1237, for appeal from orders entered after the final judgment of conviction which affect the substantial rights of the defendant.

Nevertheless, the *Placencia* holding assumes that the denial of any motion to withdraw a guilty plea is subject to the certificate requirement of section 1237.5, if the motion was based upon the invalidity of the plea. The court relied in part upon the California Supreme Court's following language in *Johnson*: "A defendant must obtain a certificate of probable cause in order to appeal from the denial of a motion to withdraw a guilty plea, even though such a motion involves a proceeding that occurs *after* the guilty plea. [Citation.]" (*Johnson, supra*, 47 Cal.4th at p. 679.) In support of its holding in *Johnson*, the California Supreme Court cited its earlier decision in *People v. Ribero* (1971) 4 Cal.3d 55 (*Ribero*), where the court had held that "the determinative factor [is]

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4 We note that the defendant in *Totari* had obtained a certificate of probable cause. (See *Totari, supra*, 28 Cal.4th at p. 880.) However, nothing in *Totari* suggests compliance with section 1237.5 was a prerequisite to the appeal.

the substance of the error being challenged, not the time at which the hearing was conducted. . . . [The defendant] cannot avoid the requirements of section 1237.5 by labelling the denial of the motion as an error in a proceeding subsequent to the plea. To hold otherwise would be to invite such motions as a matter of course, and would be wholly contrary to the purpose of section 1237.5." (*Ribero*, *supra*, at pp. 63-64, fn. omitted; *Johnson*, *supra*, at p. 679.)

The conclusion drawn by the *Placencia* court from the holdings in *Johnson* and *Ribero* was that the defendant's labeling of the appeal as one from an order after judgment could not be allowed to circumvent the requirements of section 1237.5 and thus undermine its purpose of preventing frivolous appeals following guilty and nolo contendere pleas. (*Placencia, supra*, 194 Cal.App.4th at pp. 493-494.) It was not the defendant, however, who labeled the appeal from the denial of a section 1016.5 motion as an order after judgment, appealable under subdivision (b) of section 1237. It was our Supreme Court. (*Totari, supra*, 28 Cal.4th at pp. 886-887.) In doing so, the court unambiguously held that an order denying a section 1016.5 motion to vacate was an "appealable order under section 1237, subdivision (b)." (*Totari, supra*, at p. 887.) As we have heretofore noted, section 1237, subdivision (a), is expressly subject to section 1237.5, whereas subdivision (b) is not.

In *Totari*, the court recognized that "section 1237, subdivision (b), literally permits an appeal from any postjudgment order that affects the 'substantial rights' of the defendant," subject only to the limitation that "ordinarily, no appeal lies from an order denying a motion to vacate a judgment of conviction on a ground which could have been reviewed on appeal from the judgment." (*Totari, supra*, 28 Cal.4th at p. 882, citing *People v. Thomas* (1959) 52 Cal.2d 521, 527.) The court held, however, that the limitation does not apply to an appeal from an order denying a statutory motion to vacate, such as a section 1016.5 motion. (*Totari,* at pp. 886-887.) It follows from *Totari's* reasoning that section 1237, subdivision (b) literally applies to the denial of a section 1016.5 motion, thus permitting an appeal that is not limited by section 1237.5. We conclude that no certificate of probable cause was required to perfect this appeal.

III. Standard of review

We review the trial court's ruling for abuse of discretion. (*Zamudio, supra*, 23 Cal.4th at p. 191.) To establish an abuse of discretion, defendant must show that it was exercised in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1518.) We uphold the trial court's reasonable inferences and resolution of factual conflicts if supported by substantial evidence, viewed in the light most favorable to the ruling, and we accept the court's credibility determinations. (*People v. Quesada* (1991) 230 Cal.App.3d 525, 533 (*Quesada*).)

IV. Preponderance of the evidence

Because there was no reporter's transcript and the minutes of the 1986 plea hearing did not set forth the actual advisement given regarding the immigration consequences, defendant was "presumed not to have received the required advisement." (§ 1016.5, subd. (b).) The presumption was rebuttable, and the prosecution bore the burden to prove by a preponderance of the evidence that the required advisements were given. (*People v. Dubon* (2001) 90 Cal.App.4th 944, 953-954 (*Dubon*).) Defendant contends that a preponderance of the evidence is the wrong standard of proof, and urges this court to reject the contrary holding in *Dubon* by articulating a clear and convincing standard.

Defendant acknowledges that Evidence Code section 115 provides: "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." However, he points out that where the Legislature has not established a standard of proof, the issue becomes a judicial function to be exercised by considering all aspects of the law. (*People v. Burnick* (1975) 14 Cal.3d 306, 314.) No standard of proof is specified in section 1016.5, and defendant suggests that the heightened burden of proof applied in deportation and denaturalization proceedings would be appropriate here, although a ruling on the motion does not directly result in either consequence. (See *Woodby v. INS* (1966) 385 U.S. 276, 285 [deportation]; *Schneiderman v. United States* (1943) 320 U.S. 118, 125 [denaturalization].)

We need not reach defendant's contention regarding the standard of proof, because defense counsel expressly agreed, when asked to do so by the trial court, that the standard of proof to be applied to the prosecution's burden was a preponderance of the evidence. (See *People v. Davis* (2005) 36 Cal.4th 510, 539 [invited error].)

Moreover, we agree with *Dubon* that the appropriate standard of proof is a preponderance of the evidence. Due process requires a higher standard of proof when the government deprives an individual of a liberty or property interest. (*Santosky v. Kramer* (1982) 455 U.S. 745, 754; *People v. Jason K.* (2010) 188 Cal.App.4th 1545, 1556; see *People v. Englebrecht* (2001) 88 Cal.App.4th 1236, 1255-1256.) However, the determination of the standard should be based upon a consideration not only of the individual's interests, but also of the countervailing governmental interest. (*Santosky, supra*, at p. 754; *Jason K., supra*, at p. 1556.) The standard of proof should reflect the relative importance of the ultimate decision. (*Addington v. Texas* (1979) 441 U.S. 418, 423-425.) The outcome of this proceeding would not and did not result in the deprivation of a liberty or property interest. On the other hand, the finality of judgments is an important public interest. (See *In re Crow* (1971) 4 Cal.3d 613, 622-623.) This is particularly so with regard to judgments entered upon guilty pleas. (See *Custis v. United States* (1994) 511 U.S. 485, 497.) Thus, balancing the relative importance of the ultimate decision upon a section 1016.5 motion, we conclude that the court correctly applied a preponderance standard.

V. Substantial evidence supports finding that advisements were given

Defendant also contends that even under the lower, preponderance of the evidence standard of proof, substantial evidence did not support a finding that the three required immigration advisements were given.

Absent a reporter's transcript, a minute order can sometimes amount to an adequate record of the required advisement. (*Dubon, supra*, 90 Cal.App.4th at p. 954.) In *Dubon*, there was no reporter's transcript, and the only evidence of the advisement was a minute order, nearly identical to the minute order in this case, stating that the defendant "was advised of the possible effects of his plea on any 'alien/citizenship/probation/parole

status.'" (*Ibid.*) The *Dubon* court held that while such a minute order provides some evidence that the required advisements were given, it is insufficient, without more, to establish a complete advisement of the three possible consequences: deportation, exclusion, and denial of naturalization. (*Id.* at p. 955.)

Additional evidence in this case provided substantial evidence to support the ruling. Hofman testified that he *always* advised defendants that a guilty plea could result in deportation, denial of readmission to the United States, and denial of naturalization. Evidence of habit or custom "is admissible to prove conduct on a specified occasion in conformity with the habit or custom." (Evid. Code, § 1105.)

Defendant argues that Hofman's testimony was insufficient because it was contradicted by inferences that may be drawn from the absence of clerk's notes explaining the preprinted language of the minute order. Defendant also argues that Hofman's testimony was insufficient because it was based only upon his memory, uncorroborated by notes of the plea hearing, a checklist, or a preprinted plea form.

Any inference from the terse language of the minute order that the advisement was inadequate was dispelled by Hofman's testimony where he gave a detailed recitation of his oft-given advisement of immigration consequences. Further, the authorities cited by defendant do not hold or suggest that such testimony of custom and habit must be corroborated with a written plea form containing the required advisement or other evidence. (See *Gutierrez, supra*, 106 Cal.App.4th at pp. 171-173; *Ramirez, supra*, 71 Cal.App.4th at pp. 522-523; *Quesada, supra*, 230 Cal.App.3d at pp. 533-535.) *Either* verbal *or* written advisements may be given. (*Ramirez*, at pp. 521-522.)

VI. Spanish interpreter

Defendant contends that the advisement was inadequate because evidence suggested that he may have needed a Spanish interpreter. Defendant points out that the record does not reflect that he was afforded an interpreter when he entered his plea in 1986, although one was appointed in later court proceedings. He also points to evidence that he studied English in 2008 and 2009. Defendant concludes that the advisement was not shown to have been given in a language he understood, and was thus inadequate.

Defendant's sole authority for his contention is article I, section 14 of the California Constitution: "A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings." He cites no authority supporting his suggestion that this issue may be raised for the first time on appeal or that it was the prosecution's burden to prove defendant's English proficiency.

In any event, defendant did not testify that he did not understand what he was told; he testified that he could not recall what he was told. Moreover, it was unlikely that defendant understood no English at the time he entered his plea in 1986, as he had lived in this country for more than 15 years. The record does not indicate any detail concerning the English classes taken in 2008 and 2009. It is unknown whether they were courses in basic comprehension rather than grammar or writing for the English speaker. Further, simply because an interpreter was appointed in other proceedings did not create a presumption that defendant did not understand English. (See *In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1453.) We conclude that defendant's contention has no merit.

VII. Advisements were properly given by the prosecutor

Defendant notes that section 1016.5 requires "the court" to administer the advisement. He contends that "court" is synonymous with "judge" and excludes anyone to whom the judge might delegate the duty. He concludes that by permitting the prosecutor to advise defendant, the court that took his plea violated not only the statute, but also his right to due process.

As defendant acknowledges, the court held in *Quesada* that "court" refers to the tribunal and the section 1016.5 advisements "may be given through any of the numerous individuals acting on behalf of that tribunal, including the judge, counsel, the court reporter, or the clerk. So long as the legislative purpose is advanced by having some person acting on behalf of the tribunal actually advise defendant of the immigration consequences of his plea and that advice is reflected 'on the record,' the actual adviser is immaterial. Indeed, it is common practice for the prosecutor or defense counsel, rather than the judge, to advise the defendant of his rights and the consequences of a guilty plea, including the immigration consequences, and to elicit the necessary waivers of those

rights. [Citations.]" (*Quesada, supra*, 230 Cal.App.3d at pp. 535-536; see also *Ramirez, supra*, 71 Cal.App.4th at pp. 522-523.)

Defendant contends that the plain meaning of "court" is "judge" not "tribunal," and asks that we reject *Quesada*'s reasoning because it was dictum. He also suggests that when someone other than the judge gives the advisements, the judge necessarily abdicates his responsibility to accept a plea, vacate the plea, allow defendant the opportunity to discuss the consequences of his plea, and determine whether the plea was voluntary. Defendant argues that such a procedure can create an atmosphere of subtle coercion.

We do not agree with defendant's characterization of the proceedings, or his restrictive definition of "court." Had the Legislature intended so narrow a definition, it would have used the word "judge." The Legislature enacted section 1016.5 to promote fairness by ensuring the defendant's awareness of the possibility of deportation and exclusion from admission to the United States. (*Zamudio, supra*, 23 Cal.4th at pp. 193-194 & fn. 7.) We do not agree with defendant that a more inclusive reading of "court" defeats this purpose. (*Quesada, supra*, 230 Cal.App.3d at pp. 535-536; *Ramirez, supra*, 71 Cal.App.4th at pp. 522-523.) We agree with *Quesada*'s reasoning, and adopt it here.

VIII. No abuse of discretion

In sum, the trial court applied the correct standard of proof, and substantial evidence supported the prosecution's showing that the statutorily required advisements were properly given in this case. Defendant did not establish that he needed a Spanish interpreter, or that section 1016.5 required advisement from a judge rather than from the prosecutor. We conclude that the trial court did not abuse its discretion in denying the motion.

DISPOSITION

The trial court's order denying the motion to vacate defendant's 1986 conviction is affirmed.

CERTIFIED FOR PUBLICATION

_____, J.
CHAVEZ

I concur:

_____, P. J.
BOREN

People v. Arriaga, B225443

ASHMANN-GERST, J.—Concurring and Dissenting

Although I agree that the trial court did not abuse its discretion when it denied defendant's motion to vacate judgment and set aside his guilty plea under Penal Code section 1016.5,[1] I would not reach the issue. Rather, I would follow *People v. Placencia* (2011) 194 Cal.App.4th 489, 494 [holding that before a defendant may appeal the denial of a section 1016.5 motion, he must first obtain the certificate of probable cause required by section 1237.5]. Because defendant did not obtain a certificate of probable cause, I would dismiss his appeal.

Prior to section 1237.5, "'the mere filing of a notice of appeal required preparation of a record and, in many cases, appointment of counsel; only after expenditure of those resources would an appellate court determine whether the appeal raised nonfrivolous issues that fell within the narrow bounds of cognizability.'" (*People v. Johnson* (2009) 47 Cal.4th 668, 676 (*Johnson*).) The statute was designed to "'remedy the unnecessary expenditure of judicial resources by preventing the prosecution of frivolous appeals challenging convictions on a plea of guilty.' [Citation.]" (*Ibid.*) Applying section 1237.5 does not create "'undue hardship on defendants with potentially meritorious appeals. The showing required to obtain a certificate is not stringent. Rather, the test applied by the trial court is simply "whether the appeal is clearly frivolous and vexatious or whether it involves an honest difference of opinion." [Citation.] Moreover, a defendant who files a sworn statement of appealable grounds as required by section 1237.5, but fails to persuade the trial court to issue a probable cause certificate, has the remedy of filing a timely petition for a writ of mandate [seeking review of the *refusal to issue the certificate*]. [Citations.] Thus, if he complies with section 1237.5, a defendant has ample opportunity to perfect his appeal.' [Citation.] Moreover, if all else fails, the most fundamental kinds of attack remain available on habeas corpus." (*People v.*

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1 All further statutory references are to the Penal Code unless otherwise indicated.

Buttram (2003) 30 Cal.4th 773, 793.) To implement section 1237.5, the Judicial Council promulgated California Rules of Court, rule 8.304(b). (*Johnson*, *supra*, 47 Cal.4th at p. 677, fn. 3.) The rule provides that to appeal after a no contest or guilty plea, the "defendant must file in . . . superior court—with the notice of appeal . . . —the statement required by [section 1237.5] for issuance of a certificate of probable cause." (Cal. Rules of Court, rule 8.304(b)(1).) But "[t]he defendant need not comply with (1) if the notice of appeal states that the appeal is based on: [¶] (A) The denial of a motion to suppress evidence under [section 1538.5]; or [¶] (B) Grounds that arose after entry of the plea and do not affect the plea's validity." (Cal. Rules of Court, rule 8.304(b)(4).)

There is no basis for implying an exception into section 1237.5 for an appeal following the denial of a section 1016.5 motion. An immigration advisement is no more important than any other advisement necessary for a defendant to understand the consequences of entering a no contest or guilty plea. And the need for a trial court to perform a gatekeeping function exists any time a defendant seeks to challenge the validity of a plea on appeal. The exception to section 1237.5 proposed by the majority conflicts with legislative intent and public policy, and it also conflicts with California Rules of Court, rule 8.304(b). Regardless, the majority opines that an exception is dictated by *People v. Totari* (2002) 28 Cal.4th 876 (*Totari*). But *Totari* did not discuss the applicability of section 1237.5 to an appeal from the denial of a section 1016.5 motion. A case is not authority for a proposition not considered. (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 198.)

_____, J.
ASHMANN-GERST

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am the attorney for appellant Victor Arriaga. My business address is 12121 Wilshire Boulevard, Suite 600, Los Angeles, CA 90025.

On January 10, 2012 I served the within PETITION FOR REVIEW on the interested parties by depositing a true copy thereof, enclosed in a sealed envelope addressed as follows:

Clerk, Court of Appeal, Second Appellate District, 300 S. Spring Street, Los Angeles, CA 90013

Office of the State Attorney General, 300 S. Spring Street, Ste 1700, Los Angeles, CA 90013

Clerk to the Hon. Steven Blades, Los Angeles Superior Court, 111 N. Hill Street, Los Angeles, CA 90012

California Appellate Project, 520 S. Grand Avenue, 4th Floor, Los Angeles, CA 90071-2608

Victor D. Arriaga [address omitted]

X_ BY MAIL I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on January 10, 2012. I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct.

;

JOANNA REHM