In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **VICTOR D. ARRIAGA,** **Defendant and Appellant.**	Case No. S199339

Second Appellate District, Division Two, Case No. B225443
Los Angeles County Superior Court, Case No. A537388
The Honorable Steven D. Blades, Judge

RESPONDENT'S OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

ISSUES PRESENTED

1. Must a defendant obtain a certificate of probable cause in order to appeal the denial of a motion to withdraw a guilty plea for failure by the court or counsel to advise the defendant of the immigration consequences of the plea in accordance with Penal Code section 1016.5?

2. Can the People overcome, by a preponderance of the evidence, the presumption that advisements were not given or must the presumption be overcome by clear and convincing evidence?

STATEMENT OF THE CASE

On July 7, 1986, appellant waived his rights, entered a guilty plea to a charge of possession of a deadly weapon (Pen. Code, former § 1202, subd. (a)) and was sentenced to serve three years of formal probation, plus one year in county jail, with the execution of the term stayed for a year and then stayed permanently. (1CT 5-7.) The minute order for this proceeding contained a checked box that indicates: "Defendant advised and personally waives his right to confrontation of witnesses for the purpose of cross-examination, and waives privilege against self-incrimination. Defendant advised of possible effects of plea on any alien or citizenship/probation or parole status." (1CT 4, 81.)

Nearly 24 years later, in a letter dated October 5, 2009, appellant was notified that the reporter's transcript of the July 7, 1986, proceeding could not be prepared as the reporter's notes had been destroyed pursuant to Government Code section 69955, which permits destruction of notes for noncapital proceedings after more than ten years have elapsed from the taking of the notes. (1CT 27-29.)

On January 11, 2010, appellant filed a motion in the trial court to vacate his plea on the ground that he was not adequately advised of the immigration consequences of his plea. (1CT 10-78.) A hearing was held

on the motion. (1RT 4-17.) The People stipulated that the reporter's transcript for appellant's plea proceeding was not in the court's file. (1RT 22.) The court issued a minute order denying appellant's motion. (2CT 84-86.)

Appellant filed a notice of appeal, but did not seek or obtain a certificate of probable cause. (1CT 87.) Respondent argued the appeal should be dismissed because appellant failed to comply with Penal Code section 1237.5, mandating a certificate of probable cause before he could raise the claim. Respondent further argued that in any event, the trial court did not err as the People met their burden and rebutted the presumption that appellant had not been adequately advised of the immigration consequences of his plea.

The Court of Appeal, Second Appellate District, Division One, in a published opinion rejected respondent's argument to dismiss the appeal for failure to secure a certificate of probable cause, disagreeing with the contrary opinion reached on the same issue by the Court of Appeal in *People v. Placencia* (2011) 194 Cal.App.4th 489. In the remainder of the opinion, the court affirmed the judgment on the merits, finding that: the prosecution had the burden to prove that the immigration advisements were given by preponderance of evidence; the prosecution met this burden; the defendant failed to establish that he needed a Spanish interpreter to plead guilty; and it was proper for the prosecutor rather than the judge to give the immigration advisements. A separate concurring and dissenting opinion found that the appeal should have been dismissed for the failure to seek and obtain a certificate of probable cause.

This Court granted appellant's and respondent's petitions for review.

SUMMARY OF ARGUMENT

The Court of Appeal incorrectly found that no certificate of probable cause was necessary to challenge appellant's conviction on the ground that he was not adequately advised of the immigration consequences of his plea. Its decision not only runs afoul of the sound reasoning in *People v. Placencia, supra*, 194 Cal.App.4th 489, but more importantly, it flies in the face of the most basic proposition of this Court's well-settled certificate of probable cause law that the "determinative factor" under Penal Code section 1237.5 is not *when* the hearing on the motion occurs, but the fact that the motion in substance amounts to a challenge to the plea. (See *People v. Johnson* (2009) 47 Cal.4th 668, 679; *People v. Cuevas* (2008) 44 Cal.4th 374, 381; *People v. Panizzon* (1996) 13 Cal.4th 68, 76; *People v. Kaanehe* (1977) 19 Cal.3d 1, 8; *People v. Ribero* (1971) 4 Cal.3d 55, 64.) Because appellant's motion to withdraw his plea directly challenged his plea, appellant needed a certificate of probable cause in order to appeal.

The Court of Appeal's contrary rule would encourage a defendant to withhold a motion to withdraw the plea until after judgment and then to appeal from a denial of the motion to vacate as a means of evading the certificate of probable cause requirement. Further, in older cases like this one, where the underlying conviction was in 1986, litigation will likely involve fragmentary or destroyed records and evidentiary hearings involving hazy memories of the surviving participants. This is, therefore, precisely the kind of case that is susceptible to a finding of frivolousness by the trial judge under section 1237.5.

Moreover, if it is assumed that the appeal was cognizable, the Court of Appeal correctly determined that appellant's claim was procedurally barred because he expressly agreed at trial that the People's burden to overcome the presumption that the advisements were not given was by a preponderance of the evidence. Further, on the merits, the court correctly

determined that the appropriate standard was a preponderance of the evidence as it reflected the appropriate balancing of the defendant's interests and the public's interest in the finality of judgments resulting from guilty pleas. And the Court of Appeal correctly found that the People met this burden as there was substantial evidence that the advisements were in fact given, based on the clerk's transcript that reflected this, and the prosecutor's testimony that it was his longtime practice to always give these advisements.

ARGUMENT

I. APPELLANT HAD TO SECURE A CERTIFICATE OF PROBABLE CAUSE IN ORDER TO APPEAL THE DENIAL OF HIS MOTION TO WITHDRAW HIS PLEA FOR FAILURE TO ADEQUATELY ADVISE OF THE IMMIGRATION CONSEQUENCES

The Court of Appeal wrongly held that a defendant need not secure a certificate of probable cause to appeal the denial of a motion to withdraw a plea for allegedly failing to adequately advise him or her as to the immigration consequences. Because appellant did not obtain a certificate of probable cause, the appeal should have been dismissed.

"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." (*People v. Johnson, supra,* 47 Cal.4th at p. 679.) "[T]he critical inquiry is whether a challenge to the sentence is in substance a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5." (*People v. Pannizon, supra,* 13 Cal.4th at p. 76.) "It has long been established that issues going to the validity of a plea require compliance with section 1237.5." (*Ibid.*) "[T]he primary purpose of section 1237.5 is met by requiring a certificate of probable cause for an

appeal whose purpose is, ultimately, to invalidate a plea of guilty or no contest." (*Johnson*, *supra*, 47 Cal.4th at p. 682.)

"Before the enactment of 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. Section 1237.5 was intended to remedy the unnecessary expenditure of judicial resources by preventing the prosecution of frivolous appeals challenging convictions on a plea of guilty." (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1179; accord, *People v. Mendez* (1999) 19 Cal.4th 1084, 1095 ["Section 1237.5 has as its purpose to promote judicial economy by screening out wholly frivolous guilty [and nolo contendere] plea appeals before time and money are spent on such matters as the preparation of the record on appeal, the appointment of appellate counsel, and, of course, consideration and decision of the appeal itself," internal citations and quotation marks omitted].)

In *People v. Placencia, supra,* 194 Cal.App.4th 489, the appellate court recognized that an appeal from the denial of a Penal Code section 1016.5[1] motion was "technically from an 'order made after judgment'

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[1] Penal Code section 1016.5 provides in relevant part: "(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: [¶] '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.'"

"(b) Upon request, the court shall allow the defendant additional time to consider the appropriateness of the plea in light of the advisement as described in this section. If, after January 1, 1978, the court fails to

(continued...)

([Pen. Code] § 1237, subd. (b)) and not 'from a judgment of conviction upon a plea' of guilty or nolo contendere. ([Pen. Code] § 1237.5.)" The Court of Appeal nevertheless held that a motion to withdraw a plea on these grounds required a certificate of probable cause because it followed "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 predates the entry of the plea and affects the validity of the plea." (*Id.* at pp. 493-494.)

In requiring a certificate of probable cause in this situation, the *Placencia* court applied this Court's opinions in *Johnson, supra,* 47 Cal.4th 668, and *Pannizon, supra,* 13 Cal.4th 68, which explained that the "'critical inquiry'" and "'crucial issue'" in determining whether a certificate of probable cause was required pursuant to Penal Code section 1237.5 was "'not the time and manner in which such challenge was made'" but whether the defendant's challenge was "'in substance a challenge to the validity of the plea.'" (*Placencia, supra*, 194 Cal.App.4th at pp. 493-494.) The appellate court in *Placencia* noted that Penal Code section 1237.5 only concerned "the procedure for perfecting an appeal from a judgment based on a plea of guilty or nolo contendere" and that it did not "limit the grounds upon which an appeal may be taken." (*Id.* at p. 494.) Thus, requiring a defendant in such circumstances to obtain a certificate of probable cause

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(...continued)
advise the defendant as required by this section and the defendant shows that conviction of the offense to which defendant pleaded guilty or nolo contendere may have the consequences for the defendant of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States, the court, on defendant's motion, shall vacate the judgment and permit the defendant to withdraw the plea of guilty or nolo contendere, and enter a plea of not guilty. 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."

would not impede his right to appeal any nonfrivolous cognizable issue. (*Id.* at pp. 494-495.)

The Court of Appeal in this case came to the opposite conclusion. To this end, the Court of Appeal relied on *People v. Totari* (2002) 28 Cal.4th 876, 886-887 (*Totari*), in which this Court held the denial of a section 1016.5 motion was an order made after judgment and was appealable under Penal Code section 1237, subdivision (b). From this, the Court of Appeal concluded that no certificate of probable cause was required to perfect the appeal under such circumstances because it followed "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." (*Id.* at p. 6.)[2]

The Court of Appeal erred by permitting appellant to bypass the requirements of Penal Code section 1237.5 in order to appeal the validity of his 1986 conviction. A motion pursuant to Penal Code section 1016.5 raises the issue of an alleged failure to advise a defendant of the immigration consequences of his plea, which necessarily precedes the entry of the plea. There can be no doubt that appellant's challenge was a direct challenge to the validity of his plea. (*Johnson*, *supra*, 47 Cal.4th at pp.

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[2] The Court of Appeal's reliance on *Totari* was misplaced because there, this Court did not consider whether a certificate of probable cause was required since the defendant in *Totari* in fact obtained a certificate of probable cause. (*Totari, supra*, 28 Cal.4th at p. 880.) Further, "[i]t is axiomatic that cases are not authority for propositions not considered." (*People v. Jennings* (2010) 50 Cal.4th 616, 684.) As this Court has explained in this regard, "'The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning.'" (*Ibid.*) Thus, *Totari* does not govern an issue not involved in that case: whether a certificate of probable cause is required to perfect an appeal from denial of a section 1016.5 motion.

678-679; *Panizzon, supra,* 13 Cal.4th at p. 76; *People v. Kaanehe, supra,* 19 Cal.3d at p. 8.)

This Court's recent opinion in *People v. Maultsby* (2012) 53 Cal.4th 296 (*Maultsby*), further cements the principle that the touchstone for determining the necessity of a certificate of probable cause is whether the defendant is challenging the plea's validity. In *Maultsby*, this Court held that a defendant need not secure a certificate of probable cause when, after pleading not guilty and being convicted of the underlying substantive charge, he filed an appeal which raised only his admission of a prior conviction. This Court determined the defendant did not need to secure a certificate of probable cause under these circumstances because the defendant pleaded not guilty to the substantive charge. (*Id.* at p. 302.) This Court in *Maultsby* noted the policy considerations -- "promoting economy" by "screening out wholly frivolous appeals" and preventing "the unnecessary expenditure of time and money spent on preparing the record on appeal, appointing appellate counsel, and considering and rendering the decision of the appeal itself" -- were advanced by extending Penal Code section 1237.5 only to convictions after pleas of guilty and nolo contendere. (*Id.* at p. 304, citing *People v. Mendez, supra,* 19 Cal.4th at p. 1095; see also *People v. Buttram* (2003) 30 Cal.4th 773, 781; *In re Chavez* (2003) 30 Cal.4th 643, 650-651.)

Such policy considerations invite a rejection of the Court of Appeal's decision. That decision discourages economy and invites frivolous appeals years after the conviction and after the defendant has completed the sentence and has been released, years after the memories of the witnesses have faded, and years after the records have been lost or destroyed. This danger is precisely why Penal Code section 1237.5 exists: "to weed out frivolous and vexatious appeals from the pleas of guilty or no contest, before clerical and judicial resources are wasted." (*People v. Buttram,*

supra, 30 Cal.4th at p. 790; see also *Maultsby*, *supra*, 53 Cal.4th at p. 299.) In sum, the Court of Appeal's decision violates the most basic proposition of certificate of probable cause law from *People v. Ribero, supra,* 4 Cal.3d at p. 64: that the "determinative factor" under Penal Code section 1237.5 is not *when* the hearing on the motion occurs, but the fact that the motion in substance amounts to a challenge to the plea. (See *Johnson*, *supra*, 47 Cal.4th at p. 679; *People v. Cuevas, supra,* 44 Cal.4th at p. 381; *Panizzon*, *supra*, 13 Cal.4th at p. 76; *People v. Kaanehe, supra,* 19 Cal.3d at p. 8.)

The Court of Appeal should have dismissed the appeal because appellant's claim directly challenged his plea but he did not obtain a certificate of probable cause.

II. THE COURT OF APPEAL PROPERLY DETERMINED THAT THE BURDEN TO OVERCOME THE PRESUMPTION THAT THE IMMIGRATION ADVISEMENTS WERE NOT GIVEN IS A PREPONDERANCE OF THE EVIDENCE, AND THAT THE PEOPLE MET THIS BURDEN

Initially, this Court should hold that the Court of Appeal correctly concluded that even presuming error as to the applicable standard of proof, it was invited error. (*People v. Davis* (2005) 36 Cal.4th 510, 539; see also *People v. Medina* (1995) 11 Cal.4th 694, 763.) When asked by the trial court, appellant's trial counsel expressly agreed that the standard of proof was by a preponderance of the evidence. (1RT 34.)

Moreover, as set forth below, the Court of Appeal correctly determined that the People's burden to overcome the presumption that the advisements were not given is by a preponderance of the evidence, and that the People adequately met the burden.

A. The People's Burden to Prove That the Required Advisements Were Given Is Preponderance of the Evidence

The Court of Appeal in this case correctly found that the People's burden of proof is preponderance of the evidence. This is the default standard under the Evidence Code, and no specific law trumps it. Further, this standard did not violate due process given the important interests of plea bargaining and the finality of judgments from guilty pleas, as well as a defendant's ability to pursue potentially meritorious appeals with a certificate of probable cause.

1. State Law

Penal Code section 1016.5 permits challenges to guilty pleas on the ground that the defendant was not apprised of the immigration consequences at the time. It specifically requires the court to warn defendants of the "'three distinct possible immigration consequences'" of their convictions before taking their pleas. (*People v. Gutierrez* (2003) 106 Cal.App.4th 169, 173.) "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." (Pen. Code, § 1016.5, italics added.)

Evidence Code section 600 defines a presumption as "an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action." (Evid. Code, § 600, subd. (a).) "A presumption is either conclusive or rebuttable. Every rebuttable presumption is either (a) a presumption affecting the burden of producing evidence or (b) a presumption affecting the burden of proof." (Evid. Code, § 601.) Evidence Code section 602 defines a rebuttable statutory presumption as any statute which provides "that a fact or group of facts is prima facie evidence of another fact." Where nothing in the Evidence Code

or other law declares a presumption to be conclusive, it is rebuttable. (See Evid, Code, § 620.)

The Evidence Code further provides that "[t]he effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." (Evid. Code, § 606.) "'Burden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.) "The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt. [¶] Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence. [¶] Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." (*Ibid.*)[3]

In *People v. Dubon* (2001) 90 Cal.App.4th 944, 952-953, the Court of Appeal found that the People's burden of overcoming the presumption that such advisements were not given was a preponderance of the evidence.

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[3] Although the phrase "burden of proof" is often used interchangeably to refer to both the burden of proof and the burden of production (1 Witkin, Cal. Evid. (4th ed. 2000), Burden, § 1, p. 155), these are separate. The burden of producing evidence "means the obligation of a party to introduce evidence sufficient to avoid a ruling against him on the issue." (Evid. Code, § 110.) This burden is commonly referred to as the burden of going forward with the evidence, and ends once a judge has determined whether the party's evidence is sufficient to be considered by the jury. (1 Witkin, Cal. Evid. (4th ed. 2000), Burden, § 1, pp. 155-156.) The burden of proof "means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.)

Addressing the proper standard of proof, the court correctly noted that the "Legislature did not specify that the presumption created by Penal Code section 1016.5 is conclusive; thus, the presumption is rebuttable." (*Dubon, supra*, 90 Cal.App.4th at p. 952, citing *Perales v. Department of Human Resources Dev.* (1973) 32 Cal.App.3d 332, 338.) The Court in *Dubon* concluded that Penal Code section 1016.5 established "a rebuttable presumption affecting the burden of proof, rather than the burden of producing evidence." (*Dubon, supra*, 90 Cal.App.4th at p. 953.) In coming to this conclusion, the court recognized that "[a] presumption meant to establish or implement some public policy other than facilitation of the particular action in which it applies is a presumption affecting the burden of proof." (*Ibid.*) Applying this principle, the court explained that section 1016.5 "clearly stat[ed] that its purpose is to promote fairness by requiring appropriate warnings to defendants," and that it was "apparent that the Legislature intended, by enacting the statutory presumption, to implement the public policy of mandating administration of the required advisements." (*Ibid.*)

The Court of Appeal in *Dubon* further concluded that because section 1016.5 does not specify the requirement of a burden of proof higher than a preponderance of the evidence was required, "the presumption places upon the People the burden of proving by a preponderance of the evidence the nonexistence of the presumed fact, i.e., that the required advisements were given." (*Dubon, supra*, 90 Cal.App.4th at p. 954, citing Evid. Code § 115.) This Court should adopt the sound reasoning of the Court of Appeal in *Dubon* that under state law, the People's burden to rebut the presumption is a preponderance of the evidence.

2. Due Process

Further, as the Court of Appeal determined in this case, the preponderance standard satisfies due process. In *Santosky v. Kramer* (1982) 455 U.S. 745 [102 S.Ct. 1388, 71 L.Ed.2d 599], the United States Supreme Court held that to determine whether a particular standard of proof satisfies due process requires a consideration of three factors: "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Id.* at p. 754, citing *Mathews v. Eldridge* (1976) 424 U.S. 319, 335[96 S.Ct. 893, 47 L.Ed.2d 18.)[4] Similarly, in *In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, the court stated:

> The degree of burden of proof applied in a particular situation is an expression of the degree of confidence society wishes to require of the resolution of a question of fact. The burden of proof thus serves to allocate the risk of error between the parties, and varies in proportion to the gravity of the consequences of an erroneous resolution. Preponderance of the evidence results in the roughly equal sharing of the risk of error. To impose any higher burden of proof demonstrates a preference for one side's interests. Generally, facts are subject to a higher burden of proof only where particularly important individual interests or rights are at stake; even severe civil sanctions not implicating such interests or rights do not require a higher burden of proof.

(*Id.* at p. 1490, citations omitted.)

Here, the Court of Appeal concluded the proper standard was preponderance of the evidence upon noting that the "outcome of this proceeding would not and did not result in the deprivation of liberty or

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[4] In *Santosky*, the Supreme Court held that due process required a finding of parental unfitness be supported by clear and convincing evidence to terminate parental rights. (*Id.* at pp. 768-770.)

property interest," and after balancing the defendant's interests with the important public interest in the finality of judgments, particularly those judgments rendered on guilty pleas. (Opn. at 8.) The Court of Appeal correctly reached this conclusion given the importance of plea bargaining and the opportunity for defendants to pursue nonfrivilous claims on appeal via certificates of probable cause.

"[P]lea bargaining is an integral component of the criminal justice system and essential to the expeditious and fair administration of our courts." (*In re Alvernaz* (1992) 2 Cal.4th 924, 933; see also *People v. Segura* (2008) 44 Cal.4th 921, 930.) The United States Supreme Court in *Blackledge v. Allison* (1977) 431 U.S. 63 [97 S.Ct. 1621, 52 L.Ed.2d 736] has also recognized the beneficial nature of plea bargains for parties and courts:

> Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned. The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial; he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation. Judges and prosecutors conserve vital and scarce resources. The public is protected from the risks posed by those charged with criminal offenses who are at large on bail while awaiting completion of criminal proceedings.

(*Id.* at p. 71; see also *United States v. Timmreck* (1979) 441 U.S. 780, 784 [99 S.Ct. 2085, 60 L.Ed.2d 634]; *Corbitt v. New Jersey* (1978) 439 U.S. 212, 223, fn. 12 [99 S.Ct. 492, 58 L.Ed.2d 46]; *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 362 [98 S.Ct. 663, 54 L.Ed.2d 604]; *Brady v. United States* (1970) 397 U.S. 742, 751-752 [90 S.Ct. 1463, 25 L.Ed.2d 747].)

What's more, this Court has emphasized the value of preserving final judgments from unending assaults even if some meritorious claims are

turned away as a result. (*People v. Kim* (2009) 45 Cal.4th 1078, 1107.) In declining a defendant's invitation to expand the writ of error coram nobis, this Court rejected the argument "that the interest in the finality of judgments predominates only if the judgment is just and error free," holding: "Endless litigation, in which nothing was ever finally determined, would be worse than occasional miscarriages of justice." (*Id.*, internal quotation marks omitted, citing *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 11; see also *People v. DeLouize* (2004) 32 Cal.4th 1223, 1232.)

The important public interests in the finality of judgments, particularly final judgments rendered on plea bargains, coupled with the significant difficulties in addressing such claims years and decades after the plea has been entered, records have been destroyed and memories faded, clearly weighed in favor of a preponderance of the evidence standard in rebutting the presumption that the Penal Code section 1016.5 advisements were not given.

B. Substantial Evidence Supported the Trial Court's Determination by a Preponderance of the Evidence that Advisements Had Been Given

Lastly, the Court of Appeal properly concluded that there was substantial evidence to support the trial court's finding that the immigration advisements had in fact been given. Appellant's argument on appeal necessarily failed because it went only to the weight and credibility of the evidence rather than its sufficiency.

1. Factual Background

In his motion to vacate his plea, appellant appended his declaration in which he declared that he was not a citizen when he entered the plea; that he did not recall whether he was advised of the immigration consequences

of the plea; that he was "surprised and distressed" when he learned his conviction subjected him to deportation and permanent exclusion; that when he pled, he did not know that his plea could result in permanent separation from his family and his financial livelihood; and that had he known of these immigration consequences, he would have rejected the plea and exercised his right to a jury trial or "negotiated a nondeportable offense." (1CT 23.)

At the superior court hearing on appellant's motion, former Deputy District Attorney Harold Hoffman, the calendar deputy that took appellant's 1986 plea, testified that in the courtroom in which appellant's plea was taken, the judge never took a plea, and that it was Deputy District Attorney Hoffman's practice at that time and in that courtroom to always advise a defendant of the immigration consequences of his or her plea. (1RT 4.) Deputy District Attorney Hoffman further testified that it was his habit whenever he took a plea to advise every defendant of the immigration consequences, and that he had a reputation for taking long pleas because he never wanted to be reversed. (1RT 4-5.) Accordingly, Deputy District Attorney Hoffman testified that he never rushed though a plea, and that when taking a plea, he always explained the rights first to insure that the defendant understood what was transpiring. (1RT 5.) In his 37 years as a deputy district attorney, it had never been brought to Deputy District Attorney Hoffman's attention that he had ever erred in advising a defendant of the consequences of his or her plea. (1RT 10, 12.)

Appellant testified in support of his motion that at the time he pled guilty, he had been a lawful permanent resident of the United States, also known as a "green card holder," for six years. Appellant resided in the United States for 39 years, and was the father of two children that were now 33 and 34 years old, and both were United States citizens. (1RT 14.) Appellant had never returned to live in Mexico after moving to the United

States. Appellant did not remember whether he had been advised of the immigration consequences of his plea, and testified, "[B]ut if that would have been the case, I would have fought this case because I was not guilty." Appellant three times applied to become a United States citizen. (1RT 15.) When appellant applied for citizenship in 2002, he received a letter telling him his application had been denied, and he then received an order for deportation. When being interviewed at the adjudication for his naturalization petition, appellant was asked whether he was aware that he had a felony conviction. Appellant replied that he did not know he had a felony conviction; that they had never explained it to him; and that they "never said I was going to get involved in this serious problem." After that discussion, appellant was notified that his naturalization application was denied. Appellant was scheduled to go to a deportation proceeding in April 2011. (1RT 16.) Appellant testified that after 1986, he had no other criminal convictions that may have contributed to his removal, although he had been convicted in 1994 or 1996 for driving under the influence. (1RT 17.) The People stipulated in the trial court that the reporter's transcript for appellant's 1986 plea proceeding was not in the court's file. (1RT 22.)

The court took the matter under submission and thereafter issued a minute order denying appellant's motion, ruling as follows:

> Penal Code § 1016.5(a) states: "Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: 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." If the court fails to advise the defendant of these rights, the defendant may move to vacate the judgment. Penal Code § 1016.5(c.) [¶] To prevail on a motion to vacate a judgment, the defendant must establish the following: (1) He was not properly

advised of the immigration consequences as provided by statute; (2) There exists, at the time of the motion, more than a remote possibility that the conviction will have an adverse immigration consequence; and (3) the failure to advise resulted in prejudice to the defendant. *People v. Totari* (2002) 28 Cal.4th 876, 884; *People v. Akhile* (2008) 167 Cal.App.4th 558, 562. On the prejudice factor, the defendant must show that it was reasonably probable he would not have pled guilty or nolo contendere had he been advised. *Totari*, 28 Cal.4th at 884.

Here the trial court transcript has been destroyed. Motion, Exhibit A. "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." Penal Code § 10165.5(b). The presumption, however, is rebuttable. *People v. Dubon* (2001) 90 Cal.App.4th 944, 952-53. In this case, the minute order states "Defendant advised of the possible effects of plea on any alien or citizenship/probation or parole status." This language has been deemed insufficient to show that a defendant was advised of all three possible immigration consequences. *People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1244-45. However, coupled with the sworn testimony of the deputy district attorney, it is sufficient to rebut the presumption. *Dubon*, 90 Cal.App.4th at 955-56. The trial court has the ability to weigh the deputy district attorney's testimony against the testimony of the defendant. *Id.* at 956.

Here, the now retired deputy district attorney who took the defendant's plea testified that it was his regular practice to advise defendant of the immigration consequences of a guilty plea. In particular, he advised the defendants that the immigration consequences of a plea included 1) deportation, 2) denial of re-entry or re-admission, or 3) denial of naturalization. It is clear that the second prong is not the exact language contained in the statute – that a defendant could be "excluded from admission." The failure to recall the exact language used does not necessarily mean that the advisements were not given.

Defendant argues that the failure to advise of the exact language contained in the statute makes the plea invalid. However, advisement of the three possible immigration consequences does not require recitation of the statute; substantial compliance is sufficient as long as the defendant is

advised of the three consequences. *Castro-Vasquez*, 148 Cal.App.4th 169, 173-74 ("[S]ubstantial, not literal, compliance with section 1016.5 is sufficient."). In *Gutierrez*, the prosecutor used the phrase "denied re-entry." Gutierrez, 106 Cal.App.4th at 174. The court found that this was the equivalent of "exclusion." *Id.*

Additionally, in *People v. Soriano* (1987) 194 Cal.App.3d 1470, 1475, the court held that the exact language used by the court is not critical. In fact, *Soriano* determined that a defendant who is warned of the possibility of exclusion and denial of naturalization, but not deportation, was sufficient. *Id.* Although criticized, *Soriano* has not been overturned.

The court is not unmindful of defendant's plight. However, the court's duty is to simply determine whether the plea was valid. Based upon these reasons, the motion is denied.

(2CT 84-86.)

In his appeal, appellant nevertheless argued there was no substantial evidence that the three advisements were given because Deputy District Attorney Hoffman's testimony at the hearing on his motion was "uncorroborated by any other evidence, circumstantial or otherwise" and it was based solely on his memory and his "custom and habit," rather than a "checklist" maintained in his file. (AOB 25-27.) The Court of Appeal rejected this argument, finding that the minute order indicating advisements were given combined with Deputy District Attorney Hoffman's testimony that he always gave these advisements constituted substantial evidence that the advisements were given.

C. There Was Substantial Evidence That the Advisements Were Given

Appellant's argument went to the weight and credibility of the evidence admitted rather than the sufficiency of evidence. When a superior court rules on a Penal Code section 1016.5 motion, it "is the trier of fact and hence the judge of the credibility of the witnesses or affiants." (*People*

v. Quesada (1991) 230 Cal.App.3d 525, 533.) In assessing the sufficiency of evidence, "[a] reviewing court neither reweighs evidence nor reevaluates a witness's credibility." (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) "'When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . .' [Citation.]" (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681.)

Evidence of habit or custom "is admissible to prove conduct on a specified occasion in conformity with the habit or custom." (Evid. Code, § 1105.) "'The question whether habit evidence is admissible is essentially one of threshold relevancy [and] is addressed to the sound discretion of the trial court. [Citations.]'" (*People v. Webb* (1993) 6 Cal.4th 494, 529, citing *People v. McPeters* (1992) 2 Cal.4th 1148, 1178.) Thus, in *Dubon*, *supra*, 90 Cal.App.4th at page 954, the trial judge's testimony about his habit and custom in giving immigration advisements was held sufficient, along with other evidence including a minute order identical in all material aspects to the minute order in the instant case, to overcome the presumption that the defendant had not been properly advised:

> First, we note that the court's minute order, while in this case not a sufficient record standing alone, nonetheless provided significant evidence rebutting the statutory presumption. Courts have found, in regard to waivers, that a minute order can establish a valid waiver where the transcript of the proceedings is silent. (*People v. Malabag* (1997) 51 Cal.App.4th 1419, 1423 [59 Cal.Rptr.2d 847] ["Absent a conflict between the transcripts, the clerk's transcript can establish a valid waiver where the reporter's transcript is silent on the matter"]; *In re Ian J.* (1994) 22 Cal.App.4th 833, 839 [27 Cal.Rptr.2d 728] [clerk's minutes were adequate substitute for verbatim record].) Here, the minutes provide a record that at least some advisements were given.

> Second, Judge Altman testified that his practice was to personally advise the defendant of immigration consequences in each case. He did not rush through the plea process, but attempted to ensure each defendant understood what was transpiring. The regular litany Judge Altman used correctly addressed each of the three advisements required by Penal Code section 1016.5. Judge Altman's written notes reflected that he was aware Dubon was Honduran. The trial court could reasonably infer that Judge Altman, aware Dubon was not a United States citizen, would have been especially careful to properly advise Dubon regarding the immigration consequences of his plea. Coupled with the minute order, this evidence allowed the trial court to reasonably infer that Dubon was actually advised of the immigration consequences of his plea, overcoming section 1016.5's presumption of nonadvisement.

(*Dubon, supra*, 90 Cal.App.4th at pp. 954-957.)

As in *Dubon*, the Court of Appeal correctly found that the trial court here did not abuse its discretion when it came to the reasonable conclusion that the "habit and custom" testimony -- here by the prosecutor -- coupled with the minute order, proved by a preponderance of the evidence that appellant had, in fact, been advised of the three immigration consequences of his plea in 1986, as statutorily required by Penal Code section 1016.5. Thus, here, as in *Dubon*, the evidence in this case "was sufficient to meet the People's burden of proof and rebut the statutory presumption." (*Dubon, supra*, 90 Cal.App.4th at p. 956.)

D. There Was No Prejudice

Moreover, even if the Court were to conclude appellant received an inadequate advisement, the motion to vacate was nevertheless properly denied because appellant failed to establish "that it is reasonably probable he would have not pleaded guilty or nolo contendere if properly advised." (*Totari, supra*, 28 Cal.4th at p. 884; see *People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 198 (*Zamudio*) ["'[N]ormally a motion to vacate a plea based on misadvisement or omission of a collateral

consequence requires the defendant to demonstrate that he would not have entered into the plea had he known of the consequence .' [Citations.] We see no indication that the Legislature intended section 1016.5 to operate as an exception."]; *id.* at p. 200 [when ruling on a Penal Code section 1016.5 motion, the trial court must consider not only whether it formerly failed to advise defendant as Penal Code section 1016.5 requires and whether, as a consequence of conviction, defendant actually faces one or more of the statutorily specified immigration consequences, "but also whether defendant was prejudiced by the court's having provided incomplete advisements"]; see also *People v. Akhile*, *supra*, 167 Cal.App.4th at p. 565; *People v. Castro-Vasquez*, *supra*, 148 Cal.App.4th at p. 1245.)

In *In re Resendiz* (2001) 25 Cal.4th 230, on another ground in *Padilla v. Kentucky* (2010) __ U.S. __ [130 S.Ct. 1473, 1484, 176 L.Ed.2d 284], the defense counsel misadvised the defendant that his plea would not cause him problems with immigration authorities but he would not be able to become a citizen. (*Id.* at p. 236.) Rather than analyzing whether counsel's conduct was objectively deficient, this Court instead analyzed whether the defendant had shown prejudice by a preponderance of the evidence. (*Id.* at pp. 248-254.) Although the petitioner in *Resendiz* submitted a self-serving declaration that he would not have entered his plea if he had been adequately informed of the immigration consequences of his plea, this Court found that his "assertion he would not have pled guilty if given competent advice 'must be corroborated independently by objective evidence.'" (*Id.* at p. 253.) The Court noted that the petitioner's declaration failed to show how he may have avoided a conviction or what specific defenses might have been available to him at trial. (*Id.* at p. 254; see *In re Alvernaz, supra,* 2 Cal.4th at p. 938 [defendant's self-serving statement of prejudice must be corroborated independently by objective evidence].) Put another way, the petitioner failed to demonstrate that a

decision to reject the plea would have been "rational under the circumstances." (See *Padilla v. Kentucky*, *supra*, 130 S.Ct. at p. 1485, citing *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 480 [120 S.Ct. 1029, 145 L.Ed.2d 9850].)

Turning to this case, the record provided by appellant failed to adequately demonstrate prejudice. Rather than serving any prison time for his possession of a sawed-off shotgun in violation of Penal Code section 1202, subdivision (a), appellant was instead given three years of probation, and execution of his county jail sentence was suspended, thus permitting him to avoid incarceration. Although appellant might possibly have secured an acquittal, a conviction after trial, on the other hand, would have subjected him to the same immigration consequences; and appellant offered no indication below -- and made no attempt to do so in his appeal -- of how he could possibly have avoided that result. Indeed, no evidence was offered from appellant or his counsel relating to possible defenses to the charged offense or to excuse appellant's inability to do so.

It is true that appellant declared he had no memory of whether he had been advised of the immigration consequences of his plea, and insisted he would not have entered into it had he known of the consequences. (1CT 23-25.) However, as in *Resendiz*, appellant's self-serving declaration failed to show how he may have avoided a conviction or what specific defenses might have been available to him at trial. Appellant presented no convincing evidence that he would not have pleaded guilty and would have proceeded to trial if he had been advised pursuant to the precise wording of Penal Code section 1016.5. Appellant therefore failed to demonstrate the prejudice required for a successful motion to vacate his guilty plea.

CONCLUSION

The appeal should be dismissed for appellant's failure to secure a certificate of probable cause pursuant to Penal Code section 1237.5. If this Court disagrees, it should uphold the Court of Appeal's judgment affirming the conviction.

Dated: May 2, 2012

Respectfully submitted,

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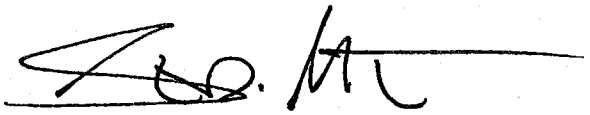

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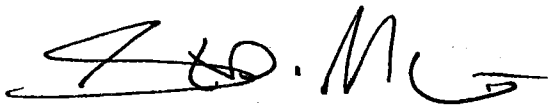
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 7,413 words.

Dated: May 2, 2012

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE

Case Name: ***People v. Victor D. Arriaga*** No.: **S199339**

I declare:

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

On May 3, 2012, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail system of the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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To be delivered to:
Hon. Steven D. Blades, Judge

California Court of Appeal
Second Appellate District, Division Two
300 South Spring Street, 2nd Floor, North
Los Angeles, CA 90013
(hand-delivered)

On May 3, 2012, I caused the original and thirteen (13) copies of the **RESPONDENT'S OPENING BRIEF ON THE MERITS** in this case to be delivered to the California Supreme Court at 350 McAllister Street, First Floor, San Francisco, California 94102 by FedEx Priority Overnight Service, tracking number 898903648793.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 3, 2012, at Los Angeles, California.

M. O. Legaspi
Declarant

Signature