IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S ANSWER BRIEF ON THE MERITS

JOANNA REHM
State Bar No. 89868
12121 Wilshire Boulevard
Suite 600
Los Angeles, CA 90025
Tel: 310-207-0059
Fax: 310-207-2780

Attorney for appellant
Victor D. Arriaga

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Other

SUMMARY OF THE ARGUMENT

Deportation is the "equivalent of banishment or exile." (*Delgadillo v. Carmichael* (1947) 332 U.S. 388, 390-391.) This view was most recently affirmed in *Padilla v. Kentucky,* (2010) 130 S.Ct. 1473, but it harkens back more than a century.

Consequently, when a non-citizen evaluates whether to plead guilty to a crime, whether a conviction may result in deportation may be more important to him than any potential jail sentence. Indeed, if he has family residing legally in the United States, he "understandably may view immigration consequences as the *only* ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges." (*In re Resendiz* (2001) 25 Cal.4th 230, 253 [emphasis added].)

Recognizing this, the Legislature enacted Penal Code, section 1016.5 which requires a court to advise a defendant, on the record, of the possibility his conviction may result in deportation, exclusion or denaturalization before accepting a guilty plea. The statute further provides that if the court fails to give the advisements, and the defendant can show his conviction may result in one of the stated consequences, he can move the court to vacate the conviction. At the motion, "absent a record the court gave the required advisements" it is presumed the advisements were not given.

The task now before this Court is to select the standard of proof the prosecutor must meet to overcome that presumption.

Presumptions designed to further important public policy "are justifiably given great weight under our state's scheme. 'Certainly if a presumption is not based on probability, but is based solely on social policy, there may be more, and not less, reason to preserve it in the face of contrary proof. A presumption based on social policy may need an extra boost to ensure that the policy is not overlooked in the face of some explanation given by the opponent.'" (*Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 882.)

A standard of proof allocates the risk of error between the litigants; thus the choice of a standard of proof requires the Court to consider the public policies underlying section 1016.5 and the gravity of the consequences flowing from an erroneous determination the defendant received the warnings. The stated legislative purpose of the statute is to protect the defendant. The consequences flowing from an erroneous finding that he was provided the required warnings means his motion to vacate the conviction is denied and removal is near certain to follow. Accordingly, the defendant should not be required to share the risk of error equally with the state. Rather, a heightened clear and convincing evidence standard of proof should be required, to ensure the important public policies

underlying section 1016.5 are not usurped.

The Court of Appeal's conclusion that a preponderance of the evidence standard of proof sufficed rested on the erroneous belief that a higher standard would be required only if appellant had a due process right to advisements; it does not. The court of appeal in *People v. Dubon* (2001) 90 Cal.App.4th 944, reached the same conclusion by mechanically applying the rules of evidence when it should have balanced the interests of the defendant against those of the state in correct fact-finding. Neither decision should be followed.

Finally, respondent's argument that the appeal from the order denying a section 1016.5 motion to vacate requires a certificate of probable cause is contrary to the express language of the relevant statutes. *People v. Placencia* (2011) 194 Cal.App.4th 489, which so holds, should be disapproved.

STATEMENT OF THE CASE AND FACTS

In 1986, defendant and appellant Victor Arriaga and Marcus Sandaval Aranda were jointly charged with one count of possessing a sawed-off shotgun, in violation of Penal Code, section 12020 (a). (CT 1.) Mr. Arriaga, a Lawful Permanent Resident, pled guilty prior to preliminary hearing and was granted probation. (CT 3-7, 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; 14-16.) But instead of becoming a citizen, 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 Penal Code, 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 pled to a non-deportable offense.[1] If that was not possible, he would have gone to trial because he was not guilty. (RT 15-16.)

There was no reporter's transcript of the guilty plea proceedings, and the reporter's notes had been destroyed pursuant to statute. (RT 80-81.) Thus the primary objective evidence that would support appellant's position

---

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

was unavailable, through no fault of his own.

The only other contemporaneous evidence of the plea hearing was the minute order of the plea, which was attached to appellant's motion. It was a pre-printed form with the box checked next to the following statement:

> Defendant advised and personally waives his right to confrontation of witnesses for the purpose of further cross-examination, and waives privilege against self-incrimination. Defendant advised of possible effects of plea on any alien or citizenship/probation or parole status.

(CT 4, 81.)

At the hearing on the motion, the prosecutor agreed the minute order was insufficient to constitute a record that appellant received all three advisements. The prosecutor also agreed that, as required by section 1016.5, a statutory presumption arose that the advisements were not given, shifting the burden to the prosecutor to prove they were. (RT 22, 25, 34.)

To rebut the presumption, the prosecutor called the former district attorney, Mr. Hofman, as a witness, who testified that Mr. Hofman took all of the pleas in his courtroom, and further testified to a "custom and habit" of advising all defendants of all three immigration consequences before they entered guilty pleas. (RT 2-10) Mr. Hofman had no recollection of appellant, had no notes in his file, and never used a card to ensure all advisements were given and given correctly; advisements were recited

solely from memory. (RT 3, 7, 11.) 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 confirmed what Mr. Hofman testified to occurred. (CT 81.)

The trial court found the minute order coupled with Mr. Hofman's testimony was sufficient to rebut the statutory presumption of non-advisement, by a preponderance of the evidence and denied the motion. (CT 84-86.)

The Court of Appeal, Division Two, affirmed. As a threshold matter, it rejected respondent's claim that the appeal should be dismissed on the grounds appellant did not obtain a certificate of probable cause (Pen. Code, §1237.5), disagreeing with *People v. Placencia* (*Placencia*) (2011) 194 Cal.App.4th 489, decided after appellant filed his notice of appeal. (Slip Opin. at p. 6.) Reaching the merits, it rejected appellant's claim that, given the important interests at stake, the statutory presumption of nonadvisement could only be overcome by clear and convincing evidence; it held the presumption could be overcome by a preponderance of the evidence and found there was substantial evidence to support the trial court's finding that presumption was overcome. (Id. at pp. 7-9.)

This Court granted review.

ARGUMENT

I. A DEFENDANT WHO APPEALS FROM AN ORDER DENYING A SECTION 1016.5 MOTION IS NOT REQUIRED TO OBTAIN A CERTIFICATE OF PROBABLE CAUSE. BY STATUTE, A CERTIFICATE IS ONLY REQUIRED FOR JUDGMENT APPEALS.

The Court of Appeal correctly held that appellant was not required to secure a certificate of probable cause before challenging the denial of his motion to vacate brought pursuant to Penal Code, section 1016.5. *Placencia* is wrong because it imposes a limitation on the right to appeal from a post-judgment order that the Legislature has not chosen to make.

Penal Code, section 1237, authorizes an appeal "(a) From a final judgment of conviction except as provided in section 1237.1 and section 1237.5" and "(b) From any order made after judgment, affecting the substantial rights of the parties."

Section 1237.5 provides: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where [the defendant has filed a request for certificate of probable cause and the court has executed it]."

In construing statutory language, the fundamental task of the reviewing court is to ascertain the intent of the lawmakers by first examining the statutory language, giving the words their usual and ordinary meaning. If there is no ambiguity, then the court presumes the lawmakers

meant what they said and the plain meaning of the language controls. (*People v. Maultsby* (2012) 53 Cal.4th 296, 299-300; *People v. Robinson* (2010) 47 Cal.4th 1104, 1138.) Sections 1237 and 1237.5 are unambiguous. A certificate is required only for appeals taken "from a judgment of conviction."

Section 1237.5 was in effect when section 1016.5 was enacted in 1977, but though the Legislature re-enacted section 1237.5 in 1988 and amended it in 2002[2], it never amended it to expand its application to appeals from orders denying section 1016.5 motions to vacate, even though such motions go to the validity of the plea. It is presumed that in enacting, re-enacting, and amending section 1237.5, the Legislature was aware of existing laws and rules of court on the subject. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 199.) It therefore must be inferred that the Legislature saw no reason to change the rule of section 1237.5 that a certificate is only required for judgment appeals and not for appeals taken from section 1016.5 denial orders.[3]

Placencia never addressed the statutory language. To the extent it

---

[2]Section 1237.5 was originally added to the Penal Code by Stats. 1965, c. 1924, §5; was amended by Stats. 1976, c. 1128, §1; was re-enacted by Stats. 1988, c. 851, §2; and amended by Stats. 2002, c. 784. Section 1016.5 was added by Stats. 1977, c. 1088, p. 23495, §1, and has not been changed.

[3]Further, "if a gap was unintentionally created by the Legislature in the pattern of criminal appeals, it is better filled by legislative attention than by judicial ingenuity." (*People v. Drake* (1977) 19 Cal.3d 749, 759.)

did, it misread it. Section 1237.5 does not apply to an appeal simply because it *follows* a judgment pursuant to a guilty plea; it applies only to appeals *from* a judgment upon a guilty plea. *Placencia* should be disapproved.

Respondent also does not address the statutory language. As did the court in *Placencia,* respondent contends allowing appeals from orders denying section 1016.5 motions without a certificate impermissibly "bypasses" the requirement of section 1237.5. (ROBM, at p. 7.) That argument is misplaced, because section 1237.5 does not require a certificate for such appeals in the first place.

Respondent's policy arguments also fail because the distinction made by the Legislature is sound. The purpose of section 1237.5 is to preclude a flood of frivolous appeals by defendants who enter guilty pleas with the aid of counsel and then, without counsel, appeal from the judgment, even though "as a general matter, a judgment of conviction entered on a defendant's plea of guilty or nolo contendere does not present any issue warranting relief on appeal." (*People v. Mendez* (1999) 19 Cal.4th 1084, 1097-1098.) Before section 1237.5 was enacted, there was no screening process in place to weed out appeals from guilty pleas that were presumptively frivolous, i.e., they raised no issue warranting relief on appeal but reflected only a change of heart by the defendant. Instead, once

the appeals were filed, the record was prepared and counsel was appointed, burdening appellate courts with appeals which gave rise to no issues warranting relief from the start. Section 1237.5 simply transferred the screening process from the appellate courts to the trial courts, at an earlier stage in the appellate process, thereby saving the State the cost and expense of record preparation and appointment of counsel. (Id. at 1095.) Strict adherence to that screening process for guilty plea judgment appeals is justified by the sheer number of criminal cases resulting in guilty plea dispositions. (See *In re Chavez* (2003) 30 Cal.4th 643, n. 5. [noting that in 2000-2001, only 5% of felony cases and 3% of misdemeanor cases resulting in convictions were decided after jury or court trial].)

However, there is no basis to assume that appeals from post-judgment orders, generally, or those involving section 1016.5 motions, specifically, present no non-frivolous issues warranting relief. As this Court previously explained in *People v. Totari* (2003) 28 Cal.4th 876, the specific statutory requirements of a section 1016.5 motion are sufficient protection to guard against impermissible appeals from orders denying them. There, the Court expressly rejected the Attorney General's argument that the resolution of the appealability issue required the court to first perform a substantive screening to satisfy itself that the appeal had merit. (Id., at p. 884) The Court further rejected the argument that, before

reaching the merits of the appeal, it alternatively had to perform a procedural screening to satisfy itself that the appeal was not a *de facto* "second appeal" from the judgment, i.e., was brought on grounds that could have been reviewed on appeal from the judgment, itself. (Id. at pp. 882, 885-887.) The Court distinguished appeals from orders denying non-statutory motions to vacate, because in the latter case, the grounds supporting a non-statutory motion are not specifically defined and so a screening process (such as the "no second appeal" rule) is justified. By contrast, the Court reasoned, no such procedural screening is required for an appeal from an order denying the section 1016.5 motion because it is a statutory motion where the grounds for making the motion are specifically established by the Legislature:

> Because the grounds supporting a nonstatutory motion are not specifically defined, the "no second appeal' rule (see *Thomas, supra,* 52 cal.2d at p. 527) serves as a procedural device to discourage defendants from raising any postjudgment claim that could have been raised before imposition of judgment or by way of direct appeal from the original judgment. (See *People v. Banks, supra,* 53 Cal.2d at p. 380.) On the other hand, the Legislature has established specific requirements for a motion to vacate under section 1016.5. Once the Legislature has determined that a noncitizen defendant has a substantial right to be given complete advisements and affords defendant a means to obtain relief by way of a *statutory* postjudgment motion to vacate, the "no second appeal" rule loses its urgency and a denial order qualifies as an "order made after judgment, affecting the substantial rights of the party" (§1237, subd. (b).).

(Id., at pp. 886-887 [emphasis in original].)

Thus, this Court in *Totari* already found an appeal from an order denying a section 1016.5 motion is not a judgment appeal under subdivision (a), and there is no need to screen such appeals to determine appealability before reaching its merits.

Respondent nonetheless argues that such appeals should be governed by the rules that govern judgment appeals from guilty pleas because the order challenges the validity of the plea and "follows" a claimed failure by the trial court to advise of immigration consequences which necessarily precedes the entry of the plea. (ROBM at p. 7.) This reasoning is also flawed. By statute, section 1237.5 does not apply to an appeal simply because it *follows* a judgment upon a guilty plea; it applies when the appeal is *from* a judgment upon a guilty plea. While respondent argues that *Maultsby* supports its position, *Maultsby* actually refutes it. There, the Court strictly construed section 1237.5 as applying to what it states it applies: judgment appeals from guilty pleas.

Finally, the cases respondent relies on were all judgment appeals where a certificate is expressly required by section 1237.5. (See *People v. Johnson* (2009) 47 Cal.4th 668, 678; *People v. Mendez, supra,* 19 Cal.4th at p. 1096; *People v. Panizzon* (1996) 13 Cal.4th 68, 75-76; *People v. Kaanehe* (1977) 19 Cal.3d 1, 8; *People v. Buttram* (2003) 30 Cal.4th 773; *People v. Ribero* (1971) 4 Cal.3d 55, 63.) While appeals from section

1016.5 motion denials involve claims going to the validity of the plea and arise from proceedings occurring after the plea, the difference in the type of appeal is a material one. Where a challenge to a plea is made by a motion that is filed, heard and decided before a judgment of conviction is entered, the denial order is reviewed on subsequent appeal from the judgment. (See, e.g., *People v. Ribero, supra,* 47 Cal.4th at p. 62.) It is the appeal from the judgment that brings the statutory certificate requirement of section 1237.5 into play. The narrow issue before the court in these cases was whether the issue sought to be reviewed on appeal was exempt from the statutory certificate requirement, i.e., was it a non-certificate issue.

By contrast, in *Placencia* and here, the appeal is not from the judgment of conviction, so there is no statutory requirement of a certificate in the first place. So while *Placencia* saw the issue before it as whether the circumstances "warrant creation of a new exception to the certificate of probable cause requirement" (*Placencia, supra,* 194 Cal.App.4th at p. 494.), it was putting the cart before the horse. Before there could even be an issue of whether a "new exception" to the certificate requirement was warranted, there had to be a statutory requirement of a certificate to begin with. There was and is not. Section 1237.5 only applies to appeals from judgments.

II. SHOULD THIS COURT CONCLUDE A CERTIFICATE IS REQUIRED, AS A MATTER OF CRIMINAL PROCEDURE, THAT REQUIREMENT SHOULD APPLY PROSPECTIVELY AND NOT TO APPELLANT.

Should the Court disagree and hold a certificate is required for appeals from orders denying motions to vacate brought under section 1016.5, this rule should operate prospectively only and not apply to appellant and others whose time to request a certificate had run when *Placencia* became final.

In determining whether to apply a rule of criminal procedure retroactively, the court looks to three principal factors: the purpose of the new rule, the extent of reliance on the old rule, and the effect retroactive application would have upon the administration of justice. (*People v. Germany* (1974) 42 Cal.App.3d 414, 421.)

To impose a certificate requirement would constitute a new rule of procedure which did not clearly exist before. Section 1237.5 does not state that a certificate is required to appeal from an order denying a section 1016.5 motion, or any other post-judgment order. Prior published cases either held that no certificate was required or accepted the appealability of rulings in motions to vacate under section 1016.5, without mention of whether a certificate of probable cause was obtained or not. (See, e.g, *People v. Gutierrez* (2003) 106 Cal.App.4th 169; *People v. Suon* (1999) 76 Cal.App.4th 1; *People v. Ramirez* (1999) 71 Cal.App.4th 519; *People v.*

Castaneda (1995) 37 Cal.App.4th 1612; *People v. Quesada* (1991) 230 Cal.App.3d 525.) While the defendant in *Totari* obtained a certificate of probable cause, this Court was silent on whether it was a prerequisite for review, as the *Placencia* court itself noted. Additionally, while unpublished decisions are generally not citeable, they are regularly published on standard legal research engines used widely by practitioners, including Lexis and Westlaw, and they also consistently held, prior to *Placencia,* that no certificate is required.[4] Accordingly, it would be unfair to bar review of appellant's claims for lack of a certificate, and unfair to dismiss appeals where the time for seeking a certificate expired before *Placencia* became final, where neither the statute nor existing law clearly required a certificate when the appeal was filed.

Also, the evil sought to be avoided by section 1237.5 is to avoid expense of record preparation and appointment of counsel where the appeal turns out to be frivolous, but no such concern exists here. Not only is the appeal not frivolous, the record and appointment of counsel occurred long

---

[4](See, e.g., *People v. Quintanilla* (2009 WL 1025908, Second App. Dist., Div'n Three); *People v. Perez* (2011 WL 2150164, same); *People v. Inga* (2008 WL 1874493 (Second App. Dist., Div'n Four); *People v. Jimenez* (2010 WL 1818680, same); *People v. Pruitt* (2005 WL 1022683, Fourth App. Dist., Div'n Two); *People v. Gutierrez Chavez* (2005 WL 289887, Fourth App. Dist, Div'n Three); *People v. Medina* (2011 WL 766949, Sixth App. Dist.); *People v. Mendoza* (2004 WL 1284016, same); see also *People v. Calderon* (2010 WL 3436428, Fifth App. Dist. [issue not decided but appellate court had previously ruled in same case that certificate was not required].)

ago.

In *People v. Scott* (1994) 9 Cal.4th 331, 357-358, the Court pronounced a new rule that errors in the court's sentencing choices and statement of reasons required an objection to preserve a challenge on appeal and held it should be applied prospectively, only, even though the issue had enjoyed both a majority and minority view in the lower courts, where it would be unfair to apply it to the defendant and might require practical alterations in the way sentencing proceedings are litigated. The same considerations apply equally here.

III. CLEAR AND CONVINCING EVIDENCE SHOULD BE REQUIRED TO OVERCOME THE STATUTORY PRESUMPTION IN PENAL CODE, SECTION 1016.5 THAT A DEFENDANT HAS NOT BEEN ADVISED OF THE IMMIGRATION CONSEQUENCES OF HIS GUILTY PLEA.

A. Background.

Boykin v. Alabama (1969) 395 U.S. 238, *In re Tahl* (1969) 1 Cal.3d 122, and *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605, collectively place an affirmative duty on trial courts to advise the accused of his constitutional rights and the direct consequences of his plea to ensure the plea was knowing and voluntary. But until 1978, there was no comparable duty for courts to advise a non-citizen defendant that if he pled guilty he could be deported or excluded, even though, to the non-citizen, the hardships imposed by deportation and exclusion are far greater than any

imprisonment. For "a deported alien may be required to sever family ties, become impoverished and return to a society in which he no longer can function and may, indeed, face life-threatening conditions. It portends drastic consequences in many cases. It is in all cases 'a life sentence of banishment.'" (*Jordan v. De George,* 341 U.S. 223, 232 [71 S.Ct. 703, 708, 95 L.Ed. 886] (1951) (Jackson, J., dissenting.)

This result followed under the doctrine of "collateral consequences," which provides that the court must only advise the defendant of those consequences that "inexorably follow" from his guilty plea and conviction. (See *People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 797.) So, while a court had discretionary authority to allow a defendant to withdraw a plea on the grounds he did not know his conviction would result in deportation, it was not required to. (Ibid.)

The Legislature responded by enacting Penal Code, section 1016.5, which mandates that a court, as a matter of fairness, must expressly advise the defendant on the record of three distinct possible immigration consequences of his conviction – deportation, exclusion from admission, and denial of naturalization – before accepting a guilty plea:

> Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime 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.

(Pen. Code, §1016.5, subd. (a).)

The Legislature also provided a remedy for the failure to advise of immigration consequences, in the form of a motion to vacate the judgment and withdraw the plea:

> If, after January 1, 1978, the court fails to 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 . . ., 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.

(§1016.5, subd. (b).)

Finally, just as *Boykin/Tahl/Bunnell* advisements had to be spread on the record or the government face the risk that the plea will be held invalid and set aside (*Boykin, supra,* 395 U.S. at pp. 243-244; *Tahl, supra,* 1 Cal.3d at p. 132; *Bunnell, supra*, 13 Cal.3d at p. 605.), the Legislature provided that if the plea judge fails to give the advisements on the record, or the record no longer exists, the government risks the same result:

> 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).)

Section 1016.5 defines when a presumption of non-advisement will

arise, but not what standard of proof is required to rebut it.

The Court of Appeal concluded the prosecutor could overcome the presumption of non-advisement by a preponderance of the evidence. In standard of proof parlance, that means the Court of Appeal placed the risk of error in the factual determination that advisements were given upon the State and the defendant in roughly equal fashion. (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 488.)

But 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 protection of the non-citizen defendant outweighs the State's interest in the finality of pleas, since the presumption of non-advisement flowing from the absence of a record showing the defendant was fully advised arises against the state, regardless of why the record does not exist, and no matter how long after conviction the motion to vacate is brought.

As will be shown, allowing the state to overcome the presumption of non-advisements by a mere preponderance of the evidence, "upon no higher degree of proof than applies in a negligence case," is simply too low because the consequences to a defendant of an erroneous factual

determination of the issue is too severe when weighed against the state's interest in the finality of pleas. The harshness of immigration law which ensnares a broad range of offenses within the definition of removable offenses, while providing few if any opportunities for relief from removal, makes the determination of whether advisements were given – and the ability of the defendant to withdraw his plea – of such monumental weight and gravity to the noncitizen defendant that he should not be asked to share equally with society the risk of error in that determination. Instead, a heightened "clear and convincing evidence" standard of proof that requires the state to rebut the presumption and show advisements were given by a high probability, proof "so clear as to leave no substantial doubt," should be required.

B. The issue is cognizable on appeal.

Respondent preliminarily argues that any error involving the standard of proof was invited error. (ROBM at p. 9.) Respondent is incorrect.

"The doctrine of invited error is limited to those situations where it is clear that counsel acted for tactical reasons or where there is a 'clearly implied tactical purpose' to counsel's actions." (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49.) There could be no tactical reason for trial counsel to lessen the prosecutor's burden in overcoming the presumption no

advisements were given.

Instead, the record demonstrates that trial counsel did no more than agree that the prevailing legal authority that controlled the trial court's action required the preponderance of the evidence standard of proof be applied. The court and counsel discussed *People v. Dubon* (2001) 90 Cal.App.4th 944 as the controlling case (RT 25, 27.), *Dubon* was the only appellate court to have addressed the standard of proof, and *Dubon* holds the preponderance of the evidence standard of proof applies to rebut the statutory presumption. So when counsel agreed with the prosecutor and court that the preponderance of the evidence standard applied (RT 34) , counsel did nothing more than acknowledge that *Dubon*, as the only authority on the subject, was binding on the trial court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Trial counsel did not invite error.

C. A non-citizen defendant has a substantial interest in correct factfinding in a section 1016.5 motion, given the near certainty that denial of the motion will result in removal.

The function of a standard of proof is to "'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision."

(*Addington v. Texas (Addington)* (1979) 441 U.S. 418, 423 [99 S.Ct. 1804, 60 L.Ed.2d 323, 329, quoting *In re Winship,* 397 U. S. 358, 370 [90 S.Ct. 1068, 1075, 25 L.Ed.2d 368] (1970).)

The choice of a standard of proof for a particular adjudication differs, depending "on the gravity of the consequences that would result from an erroneous determination of the issue involved." (*People v. Jimenez* (1978) 21 Cal.3d 595, 604; see also *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487.)

At one end of the spectrum is the "preponderance of the evidence" standard, which applies in most civil litigation involving money damages. Although the individual litigants may be intensely interested in the result, this standard reflects both society's minimal concern over the outcome and its conclusion that the litigants should bear the risk of error in roughly equal fashion. (*Addington, supra,* 441 U.S. at p. 423.)

At the other end of the spectrum is the "beyond a reasonable doubt" standard, which society has "historically and without any explicit constitutional requirement" afforded criminal defendants to ensure due process. (*Addington,* at p. 423.) The strictness of this standard reflects society's desire to minimize the risk that an erroneous judgment may deprive a criminal defendant of life or liberty. By demanding this standard in criminal prosecutions, society has imposed "almost the entire risk of error

upon itself." (Id. at p. 424.)

When the interests at stake are "more substantial than mere loss of money," courts employ an intermediate standard that includes "some combination of the words 'clear,' 'cogent,' 'unequivocal' and 'convincing.'" (*Addington,* at p. 423.) The Supreme Court has held that due process requires this burden of proof in proceedings that may stigmatize an individual or deprive him of a significant liberty interest. (Id., at pp. 425-426.) California, both statutorily and through decisional law, applies this intermediate standard in a wide range of both civil and criminal cases where important policy considerations demand an increased confidence in the factfinding determination. (See *People v. Englebrecht* (2001) 88 Cal.App.4th 1236, 1254, n. 5 [reciting cases collected at 1 Witkin, *Cal. Evidence* (4th ed. 2000), Burden of Proof and Presumptions, §39, pp.188-189.)

In choosing the standard of proof to apply when a presumption of non-advisement arises in a section 1016.5 proceeding, the Court "must be mindful that the function of legal process is to minimize the risk of erroneous decisions." (*Mathews v. Eldridge* (1976) 424 U.S.319, 335 [96 S.Ct. 893, 47 L.Ed.2d 181].) In *Zamudio,* and again in *Totari,* this Court recognized that a noncitizen defendant has a "substantial right" to be given complete advisements under section 1016.5. (*Zamudio, supra,* 23 Cal.4th at

pp. 199-200; *Totari, supra,* 28 Cal.4th at p. 883.) Given this substantial right, the standard of proof should be that standard that minimizes the risk that a plea to a deportable conviction will stand where the defendant did not receive the advisements before he pled. That standard should require proof by clear and convincing evidence.

The impact of a court's erroneous decision that a non-citizen received all required advisements is especially severe on the defendant. What prompts a defendant to file a section 1016.5 motion is not a theoretical possibility that his conviction might cause removal or exclusion in the unknown future; it is because, as was the case with appellant, Mr. Dubon, Mr. Totari, Mr. Zamudio, and countless others who have sought the protection the legislature provided them, they are already in removal proceedings due to their criminal conviction. Indeed, it is the defendant's position in these cases that those removal proceedings were the very first knowledge he had that his conviction constituted a removable offense, thus prompting him to seek relief.

Once in removal, and unless the plea is vacated, it is then virtually certain that removal or a determination of inadmissibility will follow. While federal law may authorize opportunities for relief from such dire consequences, those opportunities "belie the reality that such forms of relief are extremely difficult to obtain. If the crime does not qualify as one of

moral turpitude, chances are good it will be an aggravated felony, and vice versa, or even both. Both these categorizations limit the applicant's ability to qualify for [administrative relief]. Furthermore, the criteria established for a non-permanent resident to receive [relief] make it practically impossible for a person who pleads guilty to qualify. These options for remaining in the country are simply not available to many aliens." (Comment, *Justice Before Deportation: Idaho Should Guarantee Non-Citizens the Right to Know about Immigration Consequences of Pleading Guilty,* 42 Idaho L. Rev. 853, 873.)

Moreover, to the extent opportunities for relief do exist in the rare case, relief is hardly guaranteed. Instead, it is wholly discretionary with the Attorney General, a discretion that is not subject to judicial review. (See, e.g., 8 U.S.C. §1182, subd. (h). ["No court shall have jurisdiction to review a decision of the Attorney General to grant or deny a waiver [of a charge of inadmissibility]."]

Finally, while California law provides various means by which certain convictions can be expunged or vacated for rehabilitative purposes, they do not negate a "conviction" for purposes of federal immigration law. (*Murello-Espinoza v. INS* (9th Cir. 2001) 261 F.3d 771, 773-774.) It is only if the conviction is vacated on account of a procedural or substantive defect in the underlying criminal proceedings that immigration proceedings based

on it can be terminated. (See, e.g., *Nath v. Gonzales* (9th Cir. 2006) 467 F.3d 1185, 1187-89; *Alim v. Gonzales* (11th Cir. 2006) 446 F.3d 1239.)

Consequently, the section 1016.5 motion truly provides one of the few, if not the only avenue of a relief for a non-citizen facing removal due to a California conviction. As such, he has a very substantial interest in correct factfinding, because his ability to vacate the conviction and avoid removal depends, in the first instance, on whether the court finds he was not advised his plea could hold such serious consequences. Once the court finds he was advised, that ends the proceeding; the motion is denied and the conviction stands. Given the non-citizen defendant's interest in the outcome of the section 1016.5 motion is of such monumental weight and gravity, he should not be asked to share equally with society that risk of error. Instead, when the statutory presumption arises that the defendant was not advised of possible immigration consequences, the state should be required to prove he received them by clear and convincing evidence.

Support for this already exists in the law. Thus, a half century ago, the U.S. Supreme Court determined that the clear and convincing standard of proof must apply to facts establishing deportability or denaturalization, even when the proceedings are civil in nature. As the High Court explained in both *Woodby v. INS* (1966) 385 U.S. 276, 285 [87 S.Ct. 483, 17 L.Ed.2d 362] (deportation) and *Schneiderman v. United States* (1943) 320 U.S. 118,

125 [63 S.Ct. 1333, 1336, 87 L.Ed. 1796] (denaturalization), "clear, unequivocal, and convincing" evidence is the appropriate standard of proof because the facts supporting deportability or denaturalization are susceptible of objective proof, while the consequences to the individual are unusually drastic – deportation, expulsion, and loss of citizenship.

California decisional law also establishes that one who claims a party has waived statutorily created rights favored in the law must prove the waiver by clear and convincing evidence. "'Waiver always rests on intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts.' The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver.'" (*City of Ukiah v. Fones* (1966) 64 Cal.2d. 104, 107-108; see also *Estate of Coffin* (1937) 22 Cal.App.2d 469.) The "clear and convincing" standard applies "particularly" to the waiver of rights favored in the law. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Café and Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 61.)

At the same time, one need only look to the circumstances that give rise to the presumption to see why a preponderance of the evidence standard is too low. As a practical matter, the presumption arises when there is no reporter's transcript of the plea hearing because it has been destroyed, lost,

or never existed in the first place and the judge hearing the motion must decide whether advisements were given based on oral testimony and other circumstantial evidence. For where there is a plea transcript, a quick review may be all that is necessary to determine whether the advisements were or were not given. If the transcript shows the advisements were given, no presumption arises at all. If the transcript shows that no advisements were given, or only some were, or those that were given were incorrect, the court will find all of the required advisements were not given without resort to a presumption, because even if the minute order shows something else, the transcript controls. (*In re Birch* (1973) 10 Cal.3d 314, 320.) Similarly, written plea agreements in which the defendant acknowledges receiving the advisements have been held to constitute the "record" required by section 1016.5, and a cursory review of that contemporaneous document would also show the advisements were given or not. (See *People v. Quesada* (1991) 230 Cal.App.3d 525, 535; *People v. Ramirez* (1999) 71 Cal.App.4th 519, 523.)

But a far different situation is presented when there is no record because a transcript was never prepared, it was lost, or the reporter's notes were destroyed pursuant to statute. It is here that the presumption will arise, and it is here where the choice of a standard of proof plays an extremely critical role in the factfinder's decision, because resolution of the

factual issue will, more often than not, require the judge to evaluate the credibility of the defendant, who faces imminent deportation and is perceived to have an incentive to lie, against whatever circumstantial evidence the prosecutor can muster in an effort to "reconstruct the record" to save the plea. As was the case here and in *Dubon,* that circumstantial evidence will typically be evidence that the "custom and habit" of the plea judge was to give all required advisements, since that may be all the state has at its disposal, having failed to preserve a record.[5] The judge hearing the motion then decides whether the advisements were given, not on evidence the Legislature envisioned it would be based upon – a contemporaneous, objective written record – but on far less reliable evidence which finds its source in "the distorting and self-deluding medium of memory, to an earlier year" when the plea was actually taken. (*Baumgartner v. United States* (1943) 322 U.S. 665, 675 [64 S.Ct. 1240, 88 L.Ed. 1525.)

Faced with credibility determinations, and required to only determine whether the prosecutor met its burden to show it was more likely than not that the advisements were given, it is "unlikely that a defendant will ever prevail in a credibility contest that pits his word against that of a trial judge"

---

[5]In *Dubon,* the judge took the pleas, and he testified to his own custom and habit. (90 Cal.App.4th at p. 949.) In appellant's hearing, the former district attorney testified to his own custom and habit. (RT 2-4.)

even though the trial judge's recollection should also be viewed with skepticism, for he or she 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).) The same concern exists when, as here, the recollection testimony is that of the prosecutor who "took" the plea, since he or she not only has the same reputational and professional incentive to testify he gave the proper warnings, but also has an interest in having a plea he or she 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, rending the remedy provided under the statute illusory for a significant number of defendants." (Ibid.)

A preponderance of the evidence standard invites this undesirable result, because it is not difficult to meet. It only requires the judge hearing the section 1016. 5 motion to find that it is more likely than not that the advisements were given, regardless of whether the evidence is particularly reliable, and that decision will be affirmed on appeal so long as there is substantial evidence to support it. Consequently, the defendant, for whom the statute was designed to protect, disproportionately bears the

consequences of the state's decision to destroy the only record that may confirm the defendant's position.

The preference for a heightened standard of proof to resolve factual issues involving conflicting oral testimony based on memories of long past events, where the consequences flowing from the factual determination have severe consequences to the criminal defendant, was explained in *People v. Jiminez* (1978) 21 Cal.3d 595. The Court was faced with establishing the standard of proof for determining the admissibility of a confession where doubt existed as to its voluntariness. It noted that in determining whether the confession was voluntary, 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.) It further noted that, because this was 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.)

It 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.) A confession is then ordinarily given overwhelming weight by the jury, and a conviction results. (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), the Court's preference for a higher standard of proof when resolution of a factual issue requires the judge to weigh the credibility of the defendant against that of a government representative in circumstances where the consequences to the defendant of an erroneous determination are particularly severe, applies with equal force to the resolution of the standard of proof issue in a section 1016.5 motion.

In short, permitting the government to overcome a presumption of non-advisement by a preponderance of the evidence sets the threshold of proof unacceptably low where such important individual interests are involved. Requiring proof by clear and convincing evidence serves not only to protect the strong interests the individual has in the factual determination, but society's interest in having its judicial system comply with rules designed to serve the judicial system and thereby society as well.

D. The state's interest in the finality of guilty pleas does not support the lower preponderance of the evidence standard of proof.

Without acknowledging the substantial interest the defendant has in a correct fact-finding in section 1016.5 motions, respondent argues the interest of the state in the finality of judgments, and in particular the finality of guilty pleas, is an important interest on a par with, if not greater than, any interest defendants might have. (ROBM at pp. 14-15.) By its decision, the Court of Appeal agreed. (Opin., at p. 8.)

But this conclusion is at direct odds with the stated legislative purpose of section 1016.5, which is to protect one party - the noncitizen 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. Further, the Legislature has manifested its intent that this interest outweighs the state's interest in the finality of guilty plea, by providing that 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, even if through mistake or inadvertence or the routine destruction of records allowed by law, and no matter how long after the plea the motion to vacate is brought.

By requiring "on the record" advisements, and providing for a presumption against the state when there is no record advisements were

given, section 1016.5 also reflects a high preference for a contemporaneous, objective record of guilty plea proceedings to ensure that when an accused has waived fundamental constitutional rights and pled guilty to a crime that may have immigration consequences, meaningful post-conviction review is possible.

It is true that in *People v. Kim* (2009) 45 Cal.4th 1078, 1107, this Court recently emphasized the "value of preserving final judgments from unending assaults, even if some meritorious claims are turned away as a result." From this, respondent argues, a lower preponderance of the evidence suffices to overcome the section 1016.5 presumption. (ROBM at 14-15.) In *Kim*, the defendant took a "piecemeal" approach to eliminating the adverse consequences flowing from several different convictions, resulting in several, successive motions, and the Court held that his final coram nobis petition was properly denied because it was untimely - the defendant could not show diligence. This hardly supports the conclusion that the standard of proof required to overcome the section 1016.5 presumption should be by preponderance of the evidence.

Further, requiring the clear and convincing evidence of standard of proof will not create floodgate fears, for a number of reasons. First, even if the prosecutor is unable to overcome the presumption, the conclusion that advisements were not given does not automatically allow the defendant to

withdraw his plea. He must still show the failure to provide advisements was prejudicial. (*Zamudio, supra,* 23 Cal.4th at p. 198.) Second, while the hurdle is high for the state, it is not necessarily insurmountable. Third, with the expanded use of written plea agreements by which defendants admit receiving advisements (see, e.g., *People v. Quesada, supra,* 230 Cal.App.3d 525) and a statutory amendment which requires reporter's notes of criminal proceedings to be maintained for 10 years, and no longer just five (Govern. Code, §65995), the number of cases involving destroyed records will be substantially reduced. Fourth, even where the state's evidence may preponderate but be insufficient because it is not clear and convincing, the state finds itself in that position because it put itself there. It is through no fault of the defendant that advisements were not given, or were not given on the record, or the minute order is a pre-printed form, or any transcript was destroyed. Almost 20 years before this plea, 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.) The Court should not sanction the state's failure to comply with that mandate.

Finally, the state cannot be heard to argue that the higher standard is

inappropriate on the basis that the transcript, had it not been destroyed, would likely show the advisements were given, and given correctly. While there is a general presumption of regularity in proceedings and a statutory presumption that an official duty has been regularly performed (Evid. Code, §664.), those presumptions do not apply in section 1016.5 motions because they are wholly inconsistent with the plain language of section 1016.5 which provides that, absent a record the warnings were provided, "the defendant shall be presumed not to have received the required advisement." The explicit language of the statute unambiguously manifests a legislative intent that a presumption of regularity does not apply.

E. *Dubon's* conclusion that the presumption of non-advisement can be rebutted by a preponderance of the evidence is analytically flawed. It should be disapproved.

Respondent argued below, and argues here, that *Dubon* correctly determined that, under state law, only a preponderance of the evidence standard of proof is required to rebut the presumption arising under section 1016.5. (ROBM at pp. 11-12.) However, *Dubon's* conclusion rested on a flawed analysis of how a standard of proof is established. While the *Dubon* court performed a robust analysis of why the presumption was a rebuttable presumption shifting the burden of proof and not one shifting the burden of production, it wholly failed to recognize that the articulation of a

standard of proof to overcome a presumption, in the absence of legislative direction, requires the court to consider the nature of the interests at stake, the degree of confidence society deems necessary in the correctness of factual conclusions for the type of adjudication at hand, and the relative importance the legislature has attached to the ultimate decision.

Instead, *Dubon* looked to Evidence Code, section 115, which states that a presumption is rebuttable by a preponderance of the evidence "except as otherwise provided by law" and concluded that, because section 1016.5 does not contain a standard of proof, the default preponderance of the evidence standard applied. (90 Cal.App.4th at p. 954.)

But "law" within the meaning of section 115 is not limited to statutory law; it includes decisional law. (Evid. Code, §160; *People v. Burnick* (1975) 14 Cal.3d 306, 313-314.). As discussed ante, the choice of the standard of proof, where the legislature has not spoken, is a judicial function, to be resolved after evaluating the policy considerations applicable to the issue. (*Woodby v. INS, supra,* 385 U.S. at p. 284; *People v. Burnick, supra,* 14 Cal.3d at p. 314.) "Adopting a standard of proof is more than an empty semantic exercise." (*Addington, supra,* 441 U.S. at p. 424.)

F. The Court of Appeal's conclusion that an elevated standard of proof is required only when the defendant's due process rights are involved is contrary to law. Decisional law establishes that a clear and convincing evidence standard of proof will be applied where, as here, the interests involved are of important public interest and involve "more than money."

Without addressing *Dubon's* analysis, the Court of Appeal concluded a preponderance of the evidence standard should apply, reasoning 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 [the motion] would not and did not result in the deprivation of a liberty or property interest." (Slip Opin. at p. 8.)

Preliminarily, the conclusion that the outcome of the motion would not result in the deprivation of a liberty interest is surely called into question by the Supreme Court's decision in *Padilla v. Kentucky* (2010) 130 S.Ct. 1473. While it is true that in *Padilla,* the Supreme Court was not called upon to decide, and did not decide, whether the changing landscape of immigration law gave rise to a due process right in having the court advise the noncitizen defendant of the possible immigration consequences of a plea, the High Court expressly acknowledged the difficulty in divorcing the penalty of deportation from the conviction and recognized that "recent changes immigration law make removal nearly an automatic result for a broad class of noncitizen offenders." (Id. at p.1481.) *Padilla* essentially

closes the door on the proposition that the denial of a section 1016.5 motion "will not and does not" result in the deprivation of a liberty interest.

Further, in *People v. Jimenez, supra,* the Court concluded the highest standard of proof - beyond a reasonable doubt - was required as a matter of criminal procedure to a judge's factual finding a confession is voluntary and thus admissible, even though the direct and immediate consequence of that finding is not the loss of liberty; the direct and immediate consequence of the judge's fact finding is that the confession is admissible at trial. Whether the confession results in a conviction and loss of liberty results from the decision of a different fact-finder, the jury. Yet the higher standard of proof was required given that the confession's admission would have a powerful result on the jury, and would in most cases, be determinative of guilt or innocence. The interplay between the denial of a section 1016.5 motion and removal proceedings presents a strikingly analogous situation.

Moreover, while due process does require a higher standard of proof when the government deprives an individual of a liberty or a property interest, as noted previously, a due process right has never been the sine qua non of imposing an elevated standard of proof. (See *People v. Englebrecht* (2001) 88 Cal.App.4th 1236, 1254-1256, and cases cited in fn. 5.)

Thus, in *Englebrecht,* the court of appeal held that facts necessary to support a gang injunction must rest on clear and convincing evidence, but

not as a matter of constitutional due process. "We do not suggest, nor do we believe it necessary to find, before requiring proof by clear and convincing evidence, that the interests involved in the enjoined activities rise to the level of physical liberty or parental or First Amendment rights. [The higher standard is justified because the] interests involve more than a mere dispute over property or money." (88 Cal.App.4th at 1256.)

When a defendant moves to withdraw a plea under section 1018, he must prove he did not enter his plea knowingly and voluntarily by clear and convincing evidence, not as a matter of constitutional law, but because of the competing strong presumption that convictions are regularly and constitutionally obtained. (See *People v. Cruz* (1974) 12 Cal.3d 562.)

A clear and convincing standard of proof is also required when, as here, one party seeks to use parol evidence when public policy favors written evidence, and the parol evidence raises questions of reliability. (30 Am.Jur.2d Evid. §249.)

Clear and convincing evidence is also required to prove an oral agreement to make a will, because the parties to the alleged agreement are no longer alive and reliance must be placed on circumstantial evidence - primarily the testimony of interested intended beneficiaries, where the temptation is strong "for those inclined" to fabricate evidence. (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750 [rejecting defense argument that if the

parties had orally agreed to execute mutual wills, it was "inconceivable" that an attorney such as Mr. Crail would not have expressed that agreement in a writing].) This is not dissimilar to the problems created in section 1016.5 hearings when the preferred contemporaneous evidence does not exist and the court must rely on circumstantial evidence of what occurred from interested parties.

Finally, clear and convincing evidence is also required to prove the waiver of a known right. (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Café & Takeout III, Ltd., supra*, 30 Cal.App.4th at 60.)

As these cases demonstrate, it is not necessary for this Court to require the higher standard of proof without first finding a defendant has a due process right to be advised of immigration consequences before entering a guilty plea.

IV. IT IS REASONABLY PROBABLE THAT, APPLYING THE HIGHER STANDARD OF PROOF, THE RESULT BELOW WOULD HAVE BEEN DIFFERENT.

Because the lower court expressly applied a preponderance of the evidence standard of proof and not the more exacting clear and convincing standard of proof, remand is required since it is reasonably probable that it would have reached a different result had it been required to do so. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The trial court found the prosecutor proved, by a preponderance of

the evidence, that appellant was given the required advisements, a finding that expressly rested on weighing the testimony of Mr. Hofman against that of the defendant and finding, as did the *Dubon* court, that the former, coupled with the minute order, was sufficient to show that the three required advisements were given. (CT 85.)

Mr. Hofman's testimony was that he always took the pleas in Judge Miller's court and it was his custom and habit to advise non-citizens of all three required consequences set forth in section 1016.5 in all cases. (RT 3-4.) But not only was that testimony uncorroborated by any other evidence, it actually *contradicts* the official record of the plea that does exist – the minute order – which contains nothing more than a check next to line item 41 which states the defendant was advised on the effect of the plea on "alien or citizenship" status. (CT 81.) The minute order says nothing about deportation or exclusion. Because the minutes import absolute verity unless and until amended (*Govea v. Superior Court* (1938) 26 Cal.App.2d 27, 31–32.), it failed to show what Mr. Hofman claimed took place.

At the same time, the minute order shows that the clerk liberally added and deleted information by interlineation or handwritten notation throughout the minute order to correctly and completely record the court's proceedings. (CT 81.) From this, one can reasonably infer that the clerk made no additions or changes to line item 41 because the only advisements

Mr. Hofman gave, if any, were that the defendant's alien or citizenship "status" might be affected by conviction, not that he would be deported or, that if he left the country, he might be refused re-admission.

There was also no objective evidence to support Mr. Hofman's custom and habit testimony. He confirmed he reviewed "parts" of the district attorney file, but that file had no notes to indicate that the immigration consequences were given in this case. (RT 7.) When he took pleas, he did not use a checklist to ensure that the advisements were given; instead he did it "from memory." (RT 7.) Memories, of course, fail.

In *Dubon,* a material factor in the court's conclusion that the evidence preponderated in favor of finding the advisements were given was the plea judge's testimony that he had written a note in the file that the defendant recently came from Honduras. Thus, "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." (*Dubon, supra,* 90 Cal.App.4th at p. 956.) Even could such evidence rise to the level of clear and convincing, there was no comparable evidence here. Mr. Hofman offered nothing from his file, and the prosecutor offered nothing from the trial judge's file. While there was a discussion about whether appellant's defense attorney could elucidate anything further about the occurrences in

court that day or the custom and habit of the plea judge or Mr. Hofman, the prosecutor did not call him.

Clear and convincing evidence requires proof that is "clear, explicit and unequivocal" and "sufficiently strong to command the unhesitating assent of every reasonable mind." (1 Witkin, *Cal. Evid.* (4th ed. 2000), Burden of Proof and Presumptions at §38, p. 187.) Viewing the record as a whole, it is reasonably probable that had the trial court been required to apply that standard of proof, it would have found the prosecutor's burden was not met.

V. PREJUDICE HAS BEEN SHOWN FROM THE FAILURE TO GIVE THE REQUIRED WARNINGS.

Respondent argues that remand is not required, claiming appellant cannot show another required element of the motion, which is that he suffered prejudice by the non-advisements. But prejudice is plainly shown.

In addition to proving he was not advised, a defendant in a section 1016. 5 motion must show that immigration consequences are likely to result from the conviction, and that the failure to advise was prejudicial. (*Zamudio, supra,* 23 Cal.4th at 198.) Since appellant was in removal proceedings due to his firearm conviction when he filed the motion, the only issue remaining is whether, on remand, appellant would be able to show prejudice from the lack of advisements. He did.

The record shows that when appellant pled guilty, he had strong ties

to this country – he was a Lawful Permanent Resident, had two children born and raised here, a job, and strong involvement with his church and his community. He had none of this in Mexico, where he had not been for more than a decade. (CT 23-33.) Because the statute under which he was charged (Pen. Code, §12020 (a) (1)), both now and as it read in 1986, is a wobbler and not limited to unlawful firearm possession but includes unlawful non-firearm weapon possession offenses (e.g., possessing a blackjack, billy, etc.), it is considered a "safe haven" or "divisible" statute for immigration purposes. Thus, had the court advised appellant of the three possible immigration consequences of the plea, it is reasonably probable that he could have escaped deportation proceedings by re-negotiating the plea to a violation of the same statute, and subject to the same criminal penalties, but as a non-firearms non-deportable offense.

While respondent urges that the light penalty appellant received compels the conclusion appellant would not have rationally rejected the plea agreement, these facts actually compel the contrary inference. For they demonstrate that both the trial court and the prosecutor did not find appellant's conduct to be particularly egregious. There is every likelihood to believe that, had the consequences of the plea been told to appellant so that he could, as the statute permits, take time to negotiate a different plea that did not have immigration consequences, the prosecutor would have

offered, and the trial judge would have accepted, a plea to a non-deportable offense - proscribed by the same statute and subject to the identical maximum penalty. Finally, while this Court has required the defendant show prejudice from the failure to give the required advisements, it has never suggested that the defendant must assert, let alone prove, his factual innocence of the charged offense to demonstrate prejudice from the failure to advise. Yet, appellant asserted he would have pled not guilty and gone to trial and this should not be dismissed as merely hindsight.

Accordingly, the order denying the motion should be vacated and remanded for further proceedings.

CONCLUSION

The order denying appellant's motion to vacate his guilty plea under section 1016.5 should be reversed. There is no record showing he was warned of the three possible immigration consequences flowing from his plea, giving rise to a presumption of non-advisement. This Court should hold, contrary to the Court of Appeal below, that the applicable standard of proof the prosecutor must meet to overcome the presumption of non-advisement is by clear and convincing proof, not a mere preponderance of the evidence. Given the individual interests at stake, the defendant should not be required to equally bear with the state the risk of an erroneous

determination. Remand is necessary because, had the lower court been required to apply an elevated standard of proof, it is reasonably probable it would have reached a different result.

Further, the legislature has not required a certificate of probable cause to appeal the denial of section 1016.5 motion. *Placencia's* erection of that hurdle should be disapproved.

Respectfully submitted,

Date: July 17, 2012

JOANNA REHM

Attorney for appellant
VICTOR ARRIAGA

By Appointment of the Supreme Court

CERTIFICATE OF WORD COUNT

I, Joanna Rehm, certify that the Appellant's Answer Brief on the Merits is prepared in Times New Roman font, 13-point, and contains 10,901words, 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 July 17, 2012.

_____

JOANNA REHM

PROOF OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF LOS ANGELES)

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

On 7-17-2012 I served the within Appellant's Answer Brief on the Merits on the interested parties by depositing a true copy thereof, enclosed in a sealed envelope addressed as follows:

Office of the Attorney General
300 S. Spring Street, Rm. 1701
Los Angeles, CA 90013

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

District Attorney, Pomona Court
400 Civic Center
Pomona, CA 91766

Los Angeles Sup. Ct.
400 Civic Ctr
Pomona, CA 91766

Victor Arriaga
Appellant
[address omitted]

California Appellate Project
520 S. Grand Ave., 4th Floor
Los Angeles, CA 90071

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 July 17, 2012 at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct.

JOANNA REHM