IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. **RODRIGO MARTINEZ MARTINEZ,** Defendant and Appellant.	S199495 Ct. Ap. No. H036687 Santa Clara County Super. Ct. No. 156569

APPELLANT'S REPLY BRIEF ON THE MERITS

SUPREME COURT
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APPELLANT'S REPLY BRIEF

INTRODUCTION

When the Legislature enacted Penal Code section 1016.5, its express intent was to "promote fairness," for non-citizen defendants. (Penal Code § 1016.5, subd. (d).) Accordingly, the Legislature included a requirement that such defendants be given "a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant's counsel was unaware" of the immigration consequences of a plea. (*Ibid.*)

In *Padilla v. Kentucky* (2010) ___ U.S. ___, 130 S.Ct. 1473 (*Padilla*), the United States Supreme Court recognized that "[p]reserving a client's right to remain in the United States may be more important to the client than any potential jail sentence," and that "informed consideration of possible deportation can only benefit both the State and non-citizen defendants during the plea-bargaining process." (*Id.* at p. 1483, 1486.) The Court established a standard for assessing prejudice in cases where a

defendant pleads guilty without having been advised about the immigration consequences of his plea which asks whether "a decision to reject the plea bargain would have been rational under the circumstances." (*Id.* at p. 1485.)

Because plea negotiations that take immigration consequences into account are favored by both the Legislature and the U.S. Supreme Court, appellant advanced an approach to assessing prejudice in the context of section 1016.5 motions that asks whether rejecting the plea offer would have been rational under the defendant's circumstances as whole. Such circumstances will necessarily include the likelihood of negotiating an immigration-neutral disposition, the impact of immigration consequences on a non-citizen defendant's risk assessment of proceeding with trial, and the strength of any possible defenses versus the strength of the prosecution's case.

Appellant's approach would in no way lessen a defendant's burden of proof, and is fully in accord with the controlling constitutional principles from California law and the decisions of the U.S. Supreme Court. The approach advanced by respondent, however, would be a radical departure from the way California courts currently assess prejudice in the context of section 1016.5 motion, and does not reflect the realities of plea bargaining, nor comport with the Legislature's concerns regarding fairness for non-citizen defendants. Therefore, for the reasons herein and in appellant's

opening brief on the merits, this Court should reverse the decision of the Court of Appeal, with instructions that the Superior Court grant appellant's motion to vacate his conviction pursuant to Penal Code section 1016.5

ARGUMENT

I. FOR MOTIONS TO VACATE PURSUANT TO PENAL CODE SECTION 1016.5, A PREJUDICE TEST THAT CONSIDERS THE LIKELIHOOD OF OBTAINING AN IMMIGRATION-NEUTRAL PLEA IS CONSISTENT WITH CALIFORNIA LAW AND THE REALITIES OF THE PLEA BARGAINING PROCESS, WHILE THE RADICALLY RESTRICTIVE APPROACH ADVANCED BY RESPONDENT MUST BE REJECTED.

In his opening brief on the merits, appellant suggested an approach to assessing prejudice, based on the controlling standard of *Hill v. Lockhart* (1985) 474 U.S. 52 (*Hill*) and *In re Resendiz* (2001) 25 Cal.4th 230 (*Resendiz*), and the recent related holding in *Padilla, supra,* 559 U.S. — ,130 S.Ct. 1473, that would clarify for lower courts what are relevant to the inquiry into whether it is reasonably probable that a defendant, if properly advised, would not have pled guilty. As this Court, the California Legislature, and the U.S. Supreme Court have recognized, plea bargaining to avoid immigration consequences is a reality, and many non-citizens may regard the immigration consequences of a criminal conviction as more serious than any other punishment. Accordingly, appellant urges this Court to incorporate those factors into the prejudice test for motions to vacate pursuant to Penal Code section 1016.5.

Respondent portrays appellant as asking for a "Hail Mary" test. (RBM 22.) According to the Attorney General, appellant is asking this Court to adopt "a standard whereby prejudice is presumed if there is any possibility – however remote – of an alternative plea that might have been approved or the defendant might have chosen his luck at trial despite the overwhelming likelihood of conviction." (*Ibid.*) This Court will easily recognize that, despite respondent's colorful assertions, appellant asks for nothing of the sort. The approach advocated by appellant would not shift or reduce the burden of proof on defendants bringing motions pursuant to section 1016.5. The critical test was, and remains, the "reasonable probability" standard as set forth in the U.S. Supreme Court's decision in *Hill.* This approach would not prohibit courts from considering a defendant's likelihood of success at trial as a relevant factor in assessing prejudice, as this Court suggested in *Resendiz*. Rather, appellant merely urges this Court to direct lower courts to consider, among the relevant factors for assessing prejudice in section 1016.5 motions, (1) the reasonable probability of obtaining an immigration neutral plea, and (2) the impact that knowledge of immigration consequences would have had on the defendant's risk assessment when deciding whether or not the plead guilty to a particular offense. (AOBM 15-26.)

A. Appellant's Approach is Supported By the Controlling Constitutional Principles From California and U.S. Supreme Court Case Law.

As appellant set forth in detail in his opening brief on the merits, the well-established practice of plea bargaining to avoid immigration consequences was recognized both by the Legislature and by the United States Supreme Court. Penal Code section 1016.5, subdivision (d) provides that "to promote fairness," defendants must be given "a reasonable amount of time to negotiate with the prosecuting agency in the event the defendant or the defendant's counsel was unaware" of the immigration consequences of a plea. Similarly, the High Court in *Padilla* held that "informed consideration of possible deportation can only benefit both the State and noncitizen defendants during the plea-bargaining process." (*Padilla, supra,* 130 S.Ct. at p. 1486.) Likewise, this Court has recognized that "a noncitizen defendant with family residing legally in the United States understandably may view immigration consequences as the only ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges." (*Resendiz, supra,* 25 Cal.4th at p. 253.)

Respondent cites the U.S. Supreme Court's decision in *Premo v. Moore* (2011) ___ U.S. ___; 131 S. Ct. 733 (*Premo*) as support for "circumscribing the factors considered by a court retroactively reviewing a plea choice for prejudice." (RBM 12-13.) However, *Premo* is not controlling in this case for several reasons. First, *Premo* came to the U.S.

Supreme Court on federal habeas review, and thus, unlike *Padilla* or the instant case, *Premo* involved the far more deferential "unreasonable application" standard of review under AEDPA.[1] Second, although some of the language in *Premo* would suggest that the U.S. Supreme Court rejected the notion that other factors beyond the likelihood of success at trial might be relevant in the prejudice analysis of any error resulting in a plea, the Court's subsequent opinions in *Lafler v. Cooper* (2012) ___ U.S. ___; 132 S. Ct. 1376 (*Lafler*) and *Missouri v. Frye* (2012) ___ U.S. ___, 132 S. Ct. 1399 (*Frye*) reiterate that the context of the error is crucial when assessing prejudice, and that limiting the inquiry to whether a defendant would have proceeded to trial will not be appropriate in certain cases.

As appellant discussed at length in his opening brief on the merits, the U.S. Supreme Court has repeatedly adjusted the approach for assessing prejudice in ineffective assistance of counsel claims depending on the type of errors committed by counsel because different errors impact the outcome of the proceedings in different ways. (See AOBM 10-13.) First, in *Hill*, where the attorney error impacted the plea-bargaining process, the Court held that the prejudice test in such circumstances should "focus on whether counsel's constitutionally ineffective performance affected the outcome of the plea process." (474 U.S. at p. 59.) In *Frye*, the Court again adjusted the

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[1] The Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

prejudice test to fit the context, holding that where error involved a lost opportunity for a better plea offer, a defendant could demonstrate prejudice without stating that he would have gone to trial had he received correct advice. (*Id.* at p. 1409-1410.) As the Court explained:

> In cases where a defendant complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial, the defendant will have to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." [*Hill,* 474 U.S. at p. 59.] *Hill* was correctly decided and applies in the context in which it arose. *Hill* does not, however, provide the sole means for demonstrating prejudice arising from the deficient performance of counsel during plea negotiations. Unlike the defendant in *Hill,* Frye argues that with effective assistance he would have accepted an earlier plea offer (limiting his sentence to one year in prison) as opposed to entering an open plea (exposing him to a maximum sentence of four years' imprisonment). In a case, such as this, where a defendant pleads guilty to less favorable terms and claims that ineffective assistance of counsel caused him to miss out on a more favorable earlier plea offer, *Strickland*'s inquiry into whether "the result of the proceeding would have been different," [*Strickland v. Washintgon* (1984) 466 U.S. 668, 694] requires looking not at whether the defendant would have proceeded to trial absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed.

(*Frye, supra,* 132 S. Ct. at p. 1409-10.)

Similarly, in *Lafler*, the U.S. Supreme Court found that, where attorney error results in a rejected plea offer, a defendant need not show that he would have proceeded to trial to demonstrate prejudice, but rather must show that, but for counsel's error, "there is a reasonable probability that the plea offer would have been presented to the court, the court would have

accepted its terms, and the conviction or sentence . . . would have been less severe." (132 S. Ct. at p. 1385.) While explicitly affirming the principle set forth in *Hill* that the prejudice inquiry must focus on whether counsel's constitutionally ineffective performance affected the outcome of the plea process, the *Lafler* Court explained that the prejudice test must still be adjusted for context: "In contrast to *Hill,* here the ineffective advice led not to an offer's acceptance but to its rejection. Having to stand trial, not choosing to waive it, is the prejudice alleged." (*Lafler*, *supra*, 132 S. Ct. at p. 1385.)

The contexts of the errors in *Lafler* and *Frye* differ significantly from that in *Premo*, which involved a challenge to a plea on grounds of ineffective assistance, where an attorney advised the defendant to accept a quick plea without first attempting to suppress a confession the defendant had made to police. (131 S. Ct. at p. 738.) In that case, the Supreme Court first held that there was no ineffectiveness, where it was reasonable for the attorney to recommend an early plea to avoid the risk of a sentence of life in prison or death, and where he felt that a motion to suppress the confession would have had no impact on a trial given that other, admissible confessions existed. (*Premo*, supra, at p. 740-743.) The Court then rejected the Ninth Circuit's application of a prejudice standard which placed the burden on the State to prove that it was "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error,"

explaining that such a standard was inappropriate for ineffectiveness cases. (*Id.* at p. 744, citing *Neder v. United States* (1999) 527 U.S. 1, 18 and *Arizona v. Fulminante* (1991) 499 U.S. 279.) Following these determinative holdings, the Court, in dicta, stated its disapproval of Judge Berzon's concurrence, which found that prejudice could be established where "there was a reasonable probability that [the defendant] would have obtained a better plea agreement but for his counsel's errors," and explained that the appropriate standard for prejudice should be whether there is "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (*Id.* at p. 745 [rejecting analysis in Judge Berzon's concurring opinion in *Moore v. Czerniak* (9th Cir. 2009) 574 F.3d 1092, 1130-1131].)

Even if the Court's disapproval of the alternative plea theory in *Premo* was central to the holding in that case, the context of a section 1016.5 motion, where the trial court has erred by failing to deliver required advisements about immigration consequences of a plea, is more like the contexts of *Frye* and *Lafler* than of *Premo*. Specifically, in the context of failure to provide proper advice regarding immigration consequences – either in cases of ineffectiveness of counsel or a court's failure to comply with Penal Code 1016.5 – consideration of the likelihood of obtaining an alternative plea deal is essential to the prejudice analysis because it will be the most accurate measure of the impact of the harm. After all, when it

enacted Penal Code section 1016.5, the Legislature anticipated that properly warned defendants would require additional time to "negotiate with the prosecuting agency in the event the defendant or the defendant's counsel was unaware of the possibility of deportation, exclusion from admission to the United States, or denial of naturalization as a result of conviction." (Pen. Code § 1016.5 subd. (d).) Therefore the denial of the opportunity to engage in plea negotiations that take immigration consequences into account *is* the prejudice alleged in section 1016.5 motions.

Finally, in cases where immigration consequences are at issue, an alternative plea theory will necessarily be very specific, and will detail what the exact alternative plea should have been in order to meet the concerns of the prosecution while avoiding immigration consequences. This does not require courts to engage in wild speculation, but rather to consider whether a specific alternative was reasonably probable within a set of narrow parameters, e.g. does the proposed alternative plea satisfy concerns for public safety and need for appropriate punishment, is it supported by the facts of the case, and does it avoid the immigration consequences that affect this particular non-citizen defendant? It is unlikely that there will be more than one or two alternative pleas that fit these narrow parameters, and in many cases there will none. Therefore, the impact that the error of failing to advise about immigration consequences has on a proceeding is similar to that of *Frye* and *Lafler*, because in each case defendants must be able to

point to specific plea alternatives that could have been obtained had the errors not occurred.

B. The "Cabined" Approach Advocated by Respondent Is a Radical Departure From Current California Law and Would Needlessly Restrict Courts From Assessing All the Relevant Factors Necessary to Determine Whether a Defendant Would Have Rejected a Plea Offer if Properly Warned.

Appellant has advanced a common sense approach to assessing prejudice in the context of section 1016.5 motions, asking that this Court recognize that the most accurate method for determining the prejudicial impact of the failure to advise about immigration consequences will include consideration of the likelihood of obtaining an immigration neutral plea, and the impact that knowledge of immigration consequences will have on a defendant's risk assessment about whether to go to trial. (See AOBM 15-26.) Respondent, however, urges this Court to adopt a radical and unprecedented approach that would prohibit trial courts from considering any factors except the likelihood of success at trial to determine whether or not a defendant would have rejected a plea offer had he or she been properly advised pursuant to that statute. The "cabined" approach advocated by respondent would be a departure from the current test followed in California, which directs courts to determine if it is "reasonably probable the defendant would not have pleaded guilty if properly advised," and does not require that defendants demonstrate a likelihood of success at

trial. (RBM 16; *Zamudio, supra*, 23 Cal.4th at p. 210; see also *People v. Castro-Vasquez, supra*, 148 Cal.App.4th at p. 1245 ["[T]he probable outcome of a trial [is] *one factor* a court could consider in *assessing the likelihood that a defendant would have rejected a plea offer*."]; *People v. Akhile* (2008) 167 Cal.App.4th 558, 565 [a defendant "need not demonstrate a likelihood he would have obtained a more favorable result at trial"]; *People v. Bautista* (2004) 115 Cal.App.4th 229, 240 [defendants may be able to demonstrate prejudice in ineffectiveness cases where their attorney fails to attempt to negotiate an alternative plea that avoids immigration consequences] .)

Instead, respondent's approach, which would require that courts consider *only* the outcome of a hypothetical trial, ignores the realities of plea bargaining in a manner that is unjust to non-citizens facing possible banishment. Specifically, respondent's approach will require courts to ignore any evidence that obtaining an immigration-neutral alternative plea was reasonably probable and any evidence of how knowledge of immigration consequences would alter a defendant's risk assessment in choosing to go to trial. After urging courts to see a properly warned defendant's choice as strictly a "binary" one between accepting a plea offer with devastating immigration consequences or proceeding to trial, respondent freely admits that "[a] section 1016.5 advisement does not change the nature of defendant's choice by altering these options." (RBM

16.) In other words, under the approach advocated by respondent, a defendant who had not been warned according to statute about the immigration consequences of his plea would *never* be able to demonstrate prejudice because the lack of warnings has no impact on the only factors courts would be permitted to consider.

To stack the deck even higher, respondent asks the Court to take the view that a properly warned defendant would typically never opt to take his chances at trial, because he would risk an outcome that included both the adverse immigration consequences of the plea and the increased punishment following a conviction by jury. (RBM 17.) This is terrifically convenient for respondent's argument, but it requires courts to believe in an utter fiction, and must be rejected. Time and time again, courts have recognized that "an alien defendant might rationally be more concerned with removal than with a term of imprisonment." (*United States v. Orocio* (3d. Cir. 2011) 645 F.3d 630, 643; see also *In re Resendiz, supra,* 25 Cal.4th at p. 253, citing *Zamudio, supra,* 23 Cal.4th at pp. 206–207 ["a noncitizen defendant with family residing legally in the United States understandably may view immigration consequences as the only ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges."]; *Delgadillo v. Carmichael* (1947) 332 U.S. 388, 390-391 [the consequence of deportation is particularly severe, because it is "the equivalent of banishment or exile."]; *Padilla v. Kentucky, supra,* 130 S.Ct. at p. 1479 ["as a matter of

federal law, deportation is an integral part – indeed, sometimes the most important part – of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."]; *INS v. St. Cyr* (2001) 533 U.S. 289, 323, ["Preserving a client's right to remain in the United States may be more important to the client than any potential jail sentence."] .) Despite what respondent suggests, for non-citizen defendants wishing to remain in the United States, "it is not at all unreasonable to go to trial and risk a ten-year sentence and guaranteed removal, but with the chance of acquittal and the right to remain in the United States, instead of pleading guilty to an offense that, while not an aggravated felony, carries 'presumptively mandatory' removal consequences." (*United States v. Orocio*, supra, 645 F.3d at p. 645.)

Finally, respondent argues, untenably, that trial courts are incapable of determining the reasonable likelihood of obtaining an immigration-neutral plea, and that such a forecast would somehow violate separation of powers. Tellingly, respondent offers no support for the argument that, while courts can – and *must* – forecast how a hypothetical jury trial might have played out based on whatever meager documents might be present in the record after a plea, the same courts would be engaging in "a series of guesses" if they were to consider any evidence that, at the time the defendant entered his plea, an immigration-neutral alternative existed that could have satisfied public safety and law enforcement concerns of a reasonable prosecutor. (RBM 22.)

Reviewing courts are regularly tasked with exploring reasonable probabilities of outcomes determined by parties other than the court itself. Routinely, in the context of prejudice from trial error, courts look to determine whether a different outcome from jurors is reasonably probable. (See, e.g. *People v. Ledesma* (2006) 39 Cal.4th 641, 716 [error "requires reversal of a conviction if, taking into account the entire record, it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred."]; and see *People v. Soojian* (2010) 190 Cal.App.4th 491, 520, citing *U.S. v. Price* (9th Cir.2009) 566 F.3d 900, 911 [courts assessing prejudice must determine if the absence of an error would have changed a single juror's mind].)

Difficult as it may be for courts to forecast what an outcome might be "but for" errors in the proceedings, the U.S. Supreme Court has endorsed this practice since *Strickland, supra*, 466 U.S. 668, was decided in 1984. Given that judges preside over far more negotiated and un-negotiated pleas and sentences than they do jury trials, courts must certainly possess the same degree of institutional competence to consider alternative plea negotiations as they are to reconstruct jury trials that never took place. (See *Padilla, supra,* 130 S.Ct. at p. 1485–1486 [recognizing pleas account for nearly 95% of all criminal convictions].)

Whereas appellant advocated an approach to assessing prejudice in section 1016.5 motions that is grounded in the realities of plea-bargaining

and supported by the controlling constitutional principles from California and U.S. Supreme Court case law, the approach championed by respondent would drastically limit the factors courts can consider when assessing whether or not a properly warned defendant would have rejected a plea offer. Respondent's approach would force courts to consider only a defendant's likelihood of success at trial when assessing prejudice, despite overwhelming authority from the Legislature and the U.S. Supreme Court that acknowledges that defendants warned about immigration consequences will pursue further plea negotiations and adjust their risk assessment about taking a case to trial rather than plead guilty to a charge that is certain to trigger immigration consequences. Therefore, this Court must reject respondent's approach for assessing prejudice and instead adopt the approach advocated by appellant.

II. APPELLANT HAS MET HIS BURDEN OF PROVING THAT, HAD HE BEEN PROPERLY ADVISED, IT IS REASONABLY PROBABLE THAT HE WOULD HAVE REJECTED THE INITIAL PLEA OFFER BECAUSE HE WOULD HAVE NEGOTIATED A PLEA TO HEALTH AND SAFETY CODE SECTION 11352, OR ELECTED TO GO TO TRIAL.

Appellant stated that, had he been properly warned by the trial court prior to entering his plea, he would have "(a) insisted on a plea agreement that would have spared [him] from such immigration damage, or (b) failing that, would have exercised [his] right to a jury trial to attempt to absolve [himself] of this allegation." (1 CT 45.) Respondent argues that appellant

has failed to prove that he would have accepted the proposed immigration-neutral plea agreement of a plea-up to Health and Safety Code section 11352 because appellant's "self-serving statement" is insufficient, and because he "never suggested below that he would have been willing to plead to a greater offense." (RBM 35, citing *In re Alvernaz* (1992) 2 Cal. 4th 924, 938.)

Contrary to respondent's assertions, appellant has provided ample evidence that he would have accepted an immigration-neutral plea offer had he known to ask for one. In addition to his sworn statement, appellant has directed the Court to independent, objective evidence that, had he been warned, he would have rejected the initial plea offer. The strongest objective evidence available is the actual plea agreement itself. In exchange for pleading no contest to a violation of Health and Safety Code section 11360, which carries a maximum of two, three, or four years in prison, appellant was sentenced to 111 days in county jail, 3 years probation, and fines. (1 CT 42.) The lenient sentence appellant received is objective evidence of the prosecution's willingness to forgo a prison term in exchange for a plea, the degree of seriousness of appellant's violation of the law, and even the prosecution's sense of the strength of the People's case.

Objective evidence of appellant's possible defenses at trial also exists, and, although reasonable minds have differed throughout these proceedings as to the strength of the prosecution's case, even the prosecutor conceded that there were weaknesses that could lead to an acquittal. (1 RT 9.) That

evidence supports appellant's statement that he would have gone to trial had he been properly warned. Further objective evidence which supports appellant's declaration exists in the disparity between the excessively harsh immigration consequences – permanent banishment from the United States, despite his marriage to a U.S. citizen and the births of his U.S. citizen children – and the possible punishments appellant was likely to receive either had he negotiated an alternative plea or gone to trial. This disparity again supports appellant's statement that, had he been warned, he would have negotiated an immigration-neutral alternative plea or would have taken the case to trial. Essentially, the record already contains the objective evidence upon which appellant relies to demonstrate that, had he been properly warned, he would have rejected the plea offer.

A. Had Appellant Known to Negotiate An Immigration Neutral Plea to Health and Safety Code Section 11352, He Would Have Avoided Immigration Consequences Because the Record of His Conviction Would Have Been Insufficient to Prove That He Was Convicted of a Controlled Substance Offense Under Federal Law.

As explained in the opening brief, a plea to a violation of Health and Safety Code section 11352, wherein the drug is not specified, would not be considered a controlled substances violation, and therefore would not trigger immigration consequences under federal law. (AOBM at 29-31.) Respondent argues that appellant's proposed immigration-neutral plea to Health and Safety Code section 11352 would not have avoided immigration

consequences, because "federal immigration courts are permitted to look beyond the elements of appellant's plea and review the facts underlying the conviction." (RBM 30.) Because "the prosecutor here charged appellant with one count of transporting or selling marijuana in violation of Health and Safety Code section 11360," respondent opines, "[t]he information would have been available to federal immigration authorities." Respondent is simply wrong.

In determining whether a crime triggers inadmissibility or deportability, immigration judges must apply the two-step "categorical" approach set forth in *Taylor v. United States* (1990) 495 U.S. 575. (*See Fernandez-Ruiz v. Gonzales* (9th Cir. 2006) 468 F.3d 1159, 1163, *citing Cuevas-Gaspar v. Gonzales* (9th Cir. 2005) 430 F.3d 1013, 1017.) Under the categorical approach, an immigration judge seeking to determine whether a non-citizen's state court conviction constitutes a controlled substances violation, first must "make a categorical comparison of the elements of the statute of conviction to the [federal definition of a controlled substances offense] and decide whether the conduct proscribed [by the state statute] is broader than, and so does not categorically fall within, this [federal] definition." (*Huerta-Guevara v. Ashcroft* (9th Cir. 2003) 321 F.3d 883, 887.) As explained in the opening brief, "California law regulates the possession and sale of numerous substances that are not similarly regulated by the [CSA]," and a "controlled substance" as specified in the California

Health and Safety Code is not necessarily "included within the federal ambit of Section 102 of the [CSA]." (*Ruiz-Vidal v. Gonzales* (9th Cir. 2007) 473 F.3d 1072, 1078, as cited in AOBM 29-30.) Health and Safety Code section 11352 is therefore broader than the federal definition, and is not categorically a controlled substance offense under federal immigration law. (See *Mielewczyk v. Holder* (9th Cir. 2009) 575 F.3d 992.)

If the statute of conviction is not a categorical match because it includes both substances which are on the federal schedules as well as those that are not, immigration judges then apply a "modified" categorical approach "under which [it] may look beyond the language of the statute to a narrow, specified set of documents that are part of the record of conviction, including the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings," *Fernandez-Ruiz*, 468 F.3d at 1163-64, quoting *Tokatly v. Ashcroft* (9th Cir. 2004) 371 F.3d 613, 620 (internal quotation marks omitted). Immigration judges may not, however, look beyond the record of conviction itself to the particular facts underlying the conviction to determine if a state conviction is a controlled substance offense under federal law. "[W]hen the documents that [immigration judges] may consult under the 'modified' approach are insufficient to establish that the offense the petitioner committed qualifies as a basis for removal . . . [immigration judges] are compelled to hold that the government has not met its burden of proving that the conduct of which the

defendant was convicted constitutes a predicate offense, and the conviction may not be used as a basis for removal." (*Tokatly,* 371 F.3d at 620-21.)

A charging document may be considered part of the record of conviction when considered "in conjunction with the plea agreement, the transcript of a plea proceeding, or the judgment to determine whether the defendant pled guilty to the elements of the generic crime." (*Ruiz-Vidal, supra,* 473 F.3d 1078.) However, the record of conviction consists *only* of documents showing that a plea "necessarily admitted" facts equating to the generic crime. (*Shepard v. United States* (2005) 544 U.S. 13, 24.) In this case, the charging document alleging appellant's violation of Health and Safety Code section 11360 would not be part of the record of conviction had appellant negotiated a plea to a violation of Health and Safety Code section 11352, because the fact that appellant was initially charged with possession of marijuana has no bearing on the elements he would "necessarily admit[]" to in a plea to a violation under Health and Safety Code section 11352. (*Ibid.*)

Realistically, had appellant successfully negotiated the alternative plea, the original count would have been dismissed in light of the plea, a new count would have been added orally or by interlineation, and the minute order would reflect the change by simply citing the new Health and Safety Code section. The record of conviction in this scenario would not be sufficient evidence of a controlled substances offense under the CSA to

support removability, because the original count relating to marijuana would have been dismissed as part of the plea agreement. Indeed, had appellant pled to the alternative charge of Health and Safety Code section 11352, the record of conviction would be insufficient for removability for precisely the same reason that the information was insufficient to establish removability in *Ruiz-Vidal*. As the Ninth Circuit explained, "*Ruiz-Vidal did not plead guilty to an offense that was charged in the information*," therefore "there is simply no way for [the court] to connect the references to methamphetamine in the charging document with the conviction under Cal. Health & Safety Code § 11377(a)." (*Id.* at p. 1079, emphasis added; see also *Cisneros-Perez v. Gonzales* (9th Cir. 2006) 465 F.3d 386, 393 [a dismissed domestic violence charge does not establish a domestic relationship.]; *Martinez-Perez v. Gonzalez* (9th Cir. 2005) 417 F.3d 1022 [factual allegations in a charge of robbery in Count 1 were not established by evidence defendant pled guilty in Count 1 to theft].)

B. A Plea to Possession of a Controlled Substance in California, Where the Substance Is Not Named, Was a Recognized Immigration-Neutral Alternative At the Time Respondent Entered His Plea.

Respondent asserts that appellant "has failed to – and indeed lacks the ability to – demonstrate that he (or his counsel) would have known in 1992 that a California Health and Safety Code section 11352 conviction could

potentially be a nondeportable defense." (RBM 32.) Respondent is incorrect.

Ever since the Board of Immigration Appeals' 1965 decision in *Matter of Paulus,* 11 I. & N. Dec. 274 (B.I.A.1965), it has been understood that the plain language of the Immigration and Nationality Act requires the government to prove that the substance underlying an alien's state law conviction for possession is one that is covered by Section 102 of the Controlled Substances Act. In *Matter of Paulus*, the Immigration and Naturalization Service ("INS") sought to remove an alien on the basis of a conviction for violating Health and Safety Code section 11503. The information charged that Paulus "did offer unlawfully to sell and furnish a narcotic to a person and did then sell and deliver to such person a substance and material in lieu of such narcotic." (*Id.* at p. 274-75.) The deportation proceedings were terminated by a special inquiry officer, who reasoned that "the record being silent as to the narcotic involved in the conviction it is possible that the conviction involved a substance (such as peyote) which is a narcotic under California law but is not defined as a narcotic drug under federal law." (*Id.* at p. 275.) The INS appealed, and the Board dismissed the appeal, agreeing with the special inquiry officer that because the record was silent as to the narcotic involved, it could not be said for immigration purposes that Paulus had been convicted of a law relating to narcotic drugs. (*Ibid.*)

The reasoning of *Paulus* was subsequently followed in other Board of Immigration Appeals decisions as well, wherein the Board repeatedly employed the method of comparing the state record of conviction to the federal drug schedules in the Controlled Substances Act to determine if the government could prove the underlying state conviction was a controlled substances violation for federal immigration purposes. (*See Matter of Mena,* 17 I. & N. Dec. 38, 39 (B.I.A.1979) [upholding an order of deportation where the record of conviction revealed "beyond doubt that the 'controlled substance' the respondent had in his possession was heroin"]; *Matter of Hernandez-Ponce,* 19 I. & N. Dec. 613, 616 (B.I.A.1988) [noting that "[p]hencyclidine is listed as a controlled substance under the Controlled Substances Act"].) Indeed, the rule of *Matter of Paulus* had appeared in legal practice guides by 1988. (Kesselbrenner & Rosenberg, Immigration Law and Crimes (1988 edition) App. C.) Given the substantial body of law and other legal resources already in existence at the time appellant was charged in 1992, it strains logic to assume that appellant's counsel, had he been asked to negotiate "a plea agreement that would have spared [appellant] from such immigration damage," would not have quickly discovered through cursory research that possession of an unnamed controlled substance in California was an immigration-neutral plea. (1 CT 45.)

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C. The Record in This Case Provides a Sufficient Factual Basis to Support A Conviction For a Violation of Section 11352.

This alternative plea would have been attainable during the original proceedings because it is "reasonably related" to the charged offense, satisfying the concern that "the defendant's record, while not a completely accurate portrayal of his criminal history, will not be grossly misleading and thus will not likely result in inappropriate correctional treatment or police suspicion." (*People v. West* (1970) 3 Cal.3d 595, 613 (*West*).) Although section 11360 specifically relates to marijuana, and the list of controlled substances prohibited under section 11352 does not include marijuana, the record in this case would still provide an adequate factual basis for a "plea up" to section 11352 because it is unnecessary to the validity of a guilty or no contest plea to identify the exact controlled substance, as long as the defendant admits that the substance he possessed is on the California controlled substances schedules. (*People v. Guy* (1980) 107 Cal.App.3d 593, 601 [knowledge of the character of a controlled substance means that the defendant knew it was a controlled substance, but he or she need not have known its precise chemical composition]; *People v. Garringer* (1975) 48 Cal.App.3d 827 [knowledge for the purpose of conviction under Health and Safety Code section 11377, is knowledge of the controlled nature of the substance and not its precise chemical composition]; CALCRIM 2300, p. 204 (Spring 2008) ["The People do not need to prove that the defendant

knew which specific controlled substance (he/she) (sold/ furnished/ administered/ gave away/ transported/ imported), only that (he/she) was aware of the substance's presence and that it was a controlled substance."].)

To the extent that respondent is in effect arguing that there is not sufficient evidence of possession of a controlled substance other than marijuana in the police reports, and is essentially looking at charging principles, it must be noted that after the original charges are filed, when there is negotiation for a plea bargain, "[t]he parties to a plea agreement are free to make any lawful bargain they choose." (*People v. Buttram* (2003) 30 Cal.4th 773, 785.) A defendant does not have to plead to the original charge or to necessarily-included offenses. This Court has held that "the court, in accepting a knowing and voluntary plea of guilty or nolo contendere, is not limited in its jurisdiction to the offenses charged or necessarily included in those charged. We recognize, however, that it is desirable that in a plea bargain the lesser offense to which a defendant pleads be one 'reasonably related to defendant's conduct.'" (*West, supra*, 3 Cal.3d at p. 613, citing ABA Standards, standard 3.1(b)(ii).) The Court went on to state:

> In common practice and under the ABA standard a reasonable relationship between the charged offense and the plea obtains when (1) the defendant pleads to the same type of offense as that charged (the ABA Standards refer to this as a 'categoric similarity'), or (2) when he pleads to an offense which he may have committed during the course of conduct which led to the charge.

(*Id.* at p. 613.)

In *West* the defendant was charged with possession of marijuana in violation of Health and Safety Code section 11530, but with the consent of the district attorney, pled nolo contendere to violation of Health and Safety Code section 11557 (opening or maintaining a place for the selling, giving away, or using of a narcotic). As the Court stated in that case, the use of plea bargaining achieved a "more just result" because at the time possession of marijuana was punishable by imprisonment in the state prison for one to ten years, which would have been exceptionally harsh under the circumstances. "Plea bargaining also permits the courts to treat the defendant as an individual, to analyze his emotional and physical characteristics, and to adapt the punishment to the facts of the particular offense [citation omitted]." (*West, supra,* 3 Cal.3d at p. 605).

A reasonable prosecutor would have agreed to a "plea up" to Health and Safety Code section 11352, subdivision (a), transportation of a controlled substance, without naming the specific drug at issue, because it would have satisfied the public interest in seeing that criminal conduct result in appropriate punishment without triggering the unintended consequence of deportation. Additionally, because a plea to such a charge would still be to a drug offense, the trial court would still be permitted to impose narcotics offender registration, drug treatment, and mandatory testing as part of petitioner's probation, further serving the public's interest in deterring recidivism among drug offenders. Finally, the pleas are "reasonably

related," satisfying the concern that "the defendant's record, while not a completely accurate portrayal of his criminal history, will not be grossly misleading and thus will not likely result in inappropriate correctional treatment or police suspicion." (*West, supra*, 3 Cal. 3d at p. 613.)

D. Appellant Has Met His Burden of Proving That, Had He Been Unable to Secure An Immigration-Neutral Plea, He Would Have Preferred His Chances At Trial Over a Plea to Section 11360.

Respondent argues that appellant "failed to adduce objective evidence that he would have chosen his chances at trial," had he been properly warned pursuant to Penal Code section 1016.5. Respondent is incorrect. As appellant argued at length in his opening brief on the merits, in appellant's case, the immigration consequences of his plea are drastically harsher than the likely penal consequences of proceeding to trial. (AOBM 32-39.) Specifically, as a result of his plea, appellant will be permanently banished from the United States despite his marriage to a lawful U.S. resident and the births of his U.S. citizen children. However, even after a trial, in light of the fact that appellant was actually sentenced to a mere 111 days in jail and three years of probation, it is reasonable to infer that something less than the maximum sentence of 4 years would have been imposed. (1 CT 92.) Finally, this record contains statements from the prosecution that there were "weaknesses" in their case that could have led to an acquittal. (1 RT 9.) This is all objective evidence that appellant would have preferred his

chances at trial over a plea to Health and Safety Code section 11360 had he been properly warned.

Appellant has amply demonstrated that, had he been warned by the trial court pursuant to Penal Code section 1016.5, it is reasonably probable that he would have been able to negotiate an immigration neutral plea to Health and Safety Code section 11352, or would have altered his risk assessment and elected to proceed to trial. Respondent's arguments to the contrary are unavailing insofar as they rely on incorrect legal analysis and ignore the numerous examples of objective evidence contained in the record that supports appellant's contentions. Accordingly, this Court should find that appellant has demonstrated that he was prejudiced by the trial court's failure to comply with the requirements of Penal Code section 1016.5

CONCLUSION

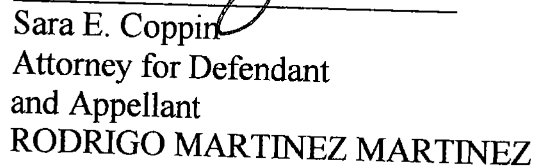
Although the approach to assessing prejudice advocated by appellant in no way lessens a defendant's burden of proof in the context of section 1016.5 motions, it clarifies for lower courts that the prejudice analysis must focus on how a non-citizen defendant's circumstances will affect his decision-making process during plea negotiations. Specifically, appellant's approach would direct courts to consider the likelihood of obtaining an immigration neutral plea bargain, and the impact that knowledge of immigration consequences would have on a defendant's risk assessment about whether to go to trial. On the other hand, the "success at trial"

approach advanced by respondent would be a radical departure from the way California courts currently assess prejudice in the context of section 1016.5 motions, and does not reflect the realities of plea bargaining, nor comport with the Legislatures concerns regarding fairness for non-citizen defendants.

For the reasons given herein and in the opening brief on the merits, the Court should reverse the decision of the Court of Appeal, with instructions that the Superior Court grant appellant's motion to vacate his conviction pursuant to Penal Code section 1016.5.

Dated: October 3, 2012

Respectfully submitted,



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CERTIFICATION OF WORD COUNT

Pursuant to California Rules of Court, rule 8.520(c)(1), I hereby certify the number of words in Appellant's Reply Brief is 7,085 based on the calculation of the computer program used to prepare this brief. The applicable word-count limit is 8400.

Dated: October 3, 2012

Sara E. Coppin

DECLARATION OF SERVICE

Re: People v. Rodrigo Martinez-Martinez No. S199495

I, Sara E. Coppin, declare that I am over 18 years of age, employed in the County of San Francisco, and not a party to the within action; my business address is 226 Colfax Avenue, Grass Valley CA 95945, I am a member of the bar of this court.

On October 4, 2012, I served the within

APPELLANT'S REPLY BRIEF ON THE MERITS

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

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

Executed on October 4, 2012, at Grass Valley, California.

SARA E. COPPIN